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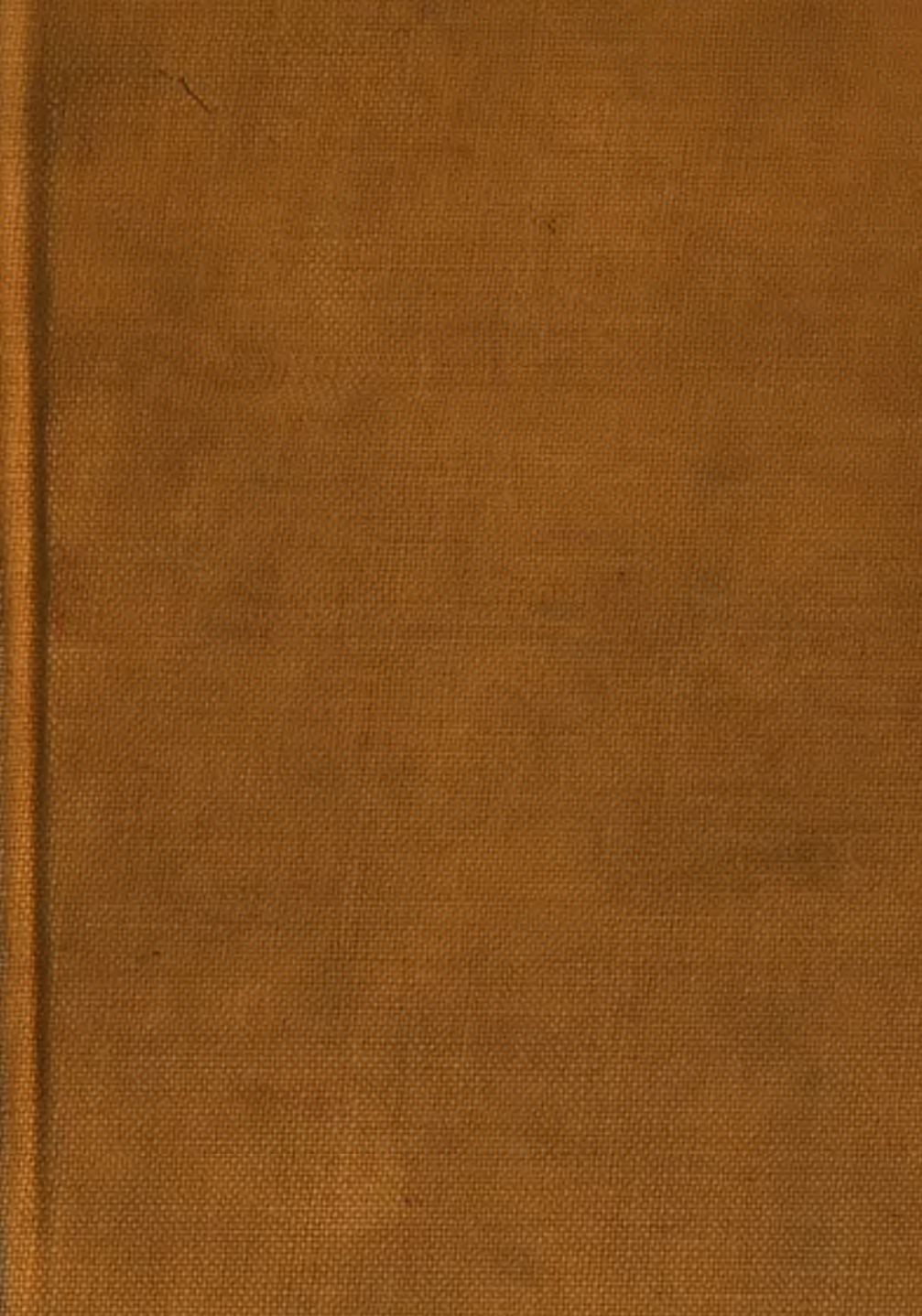
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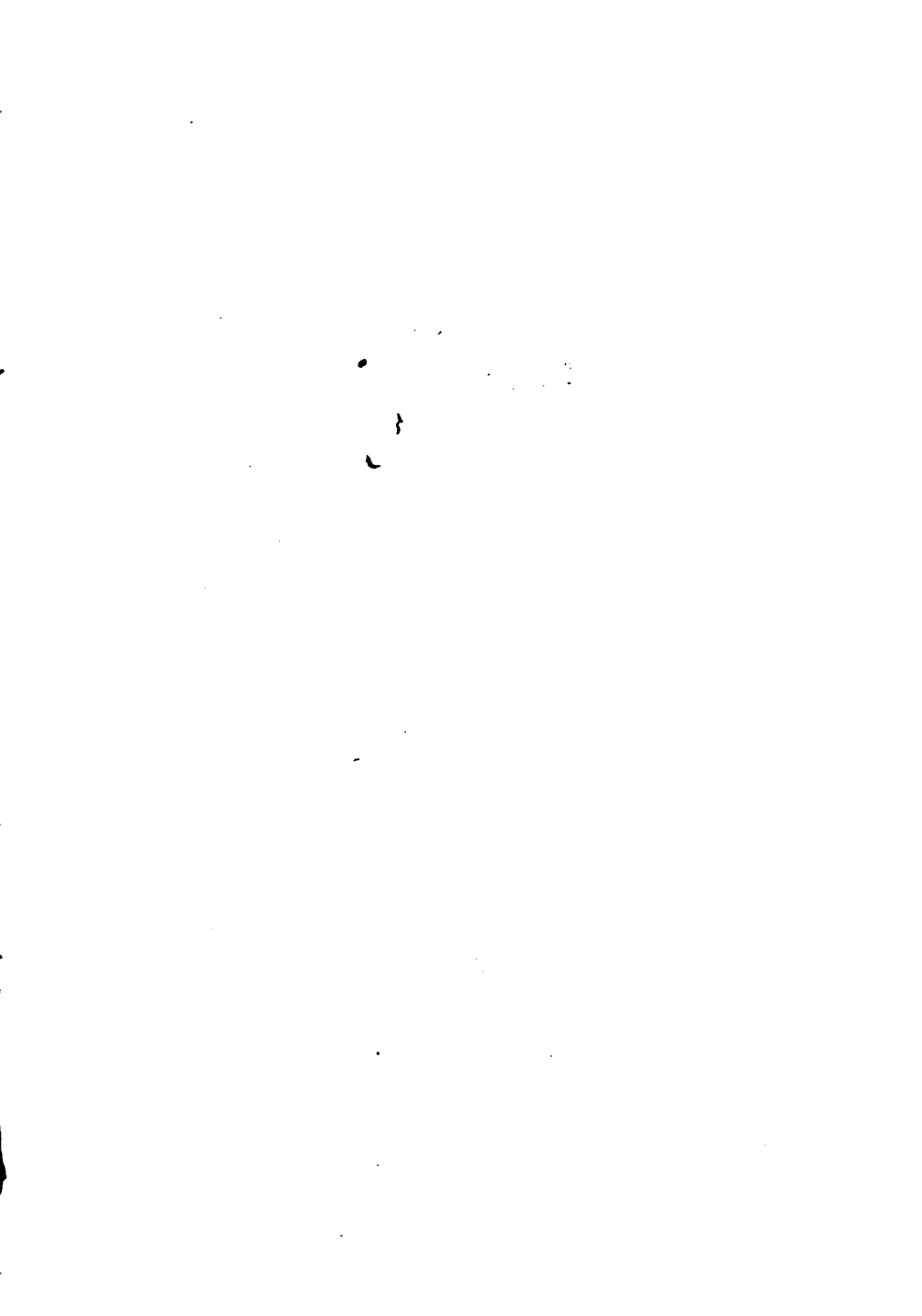
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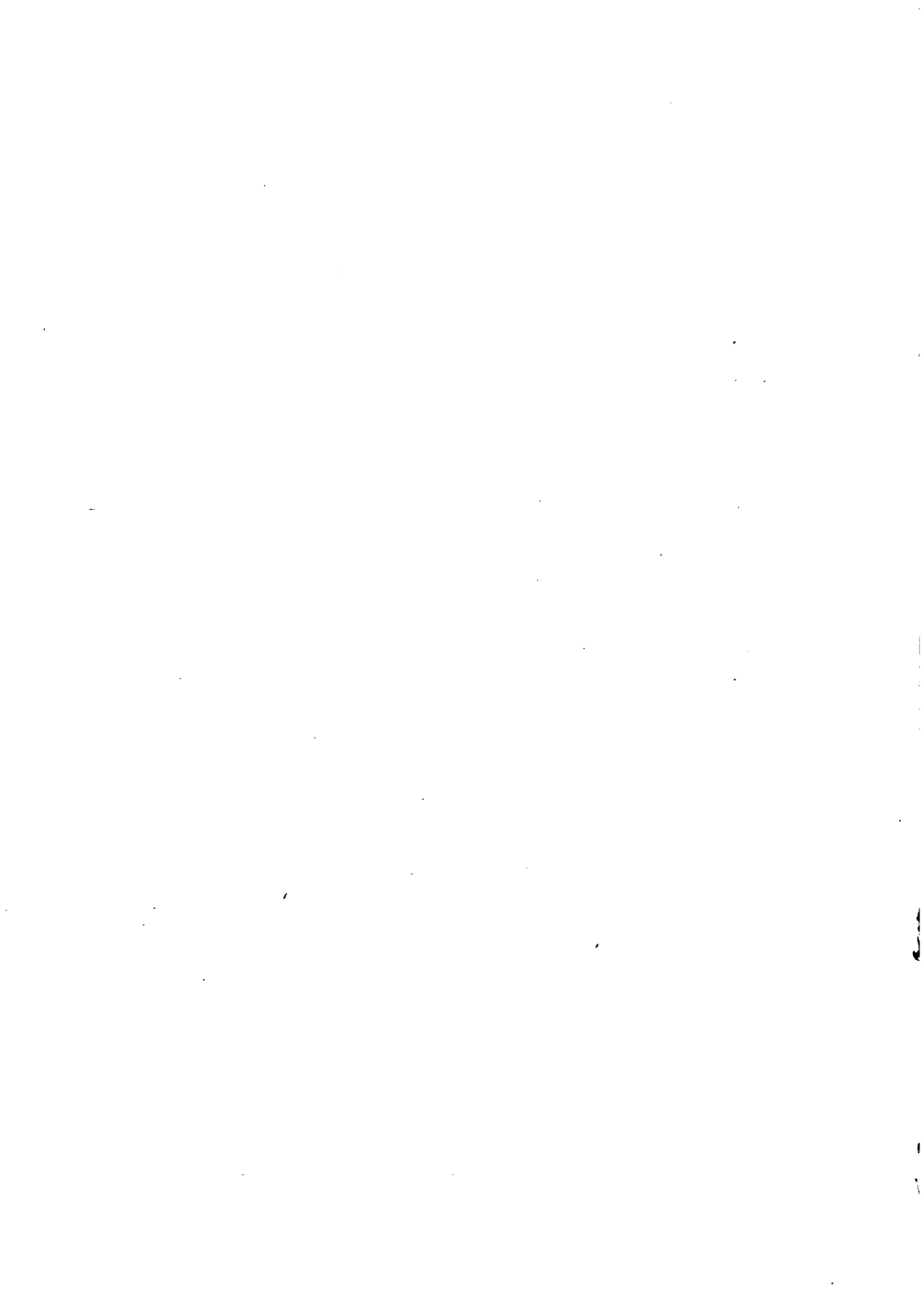
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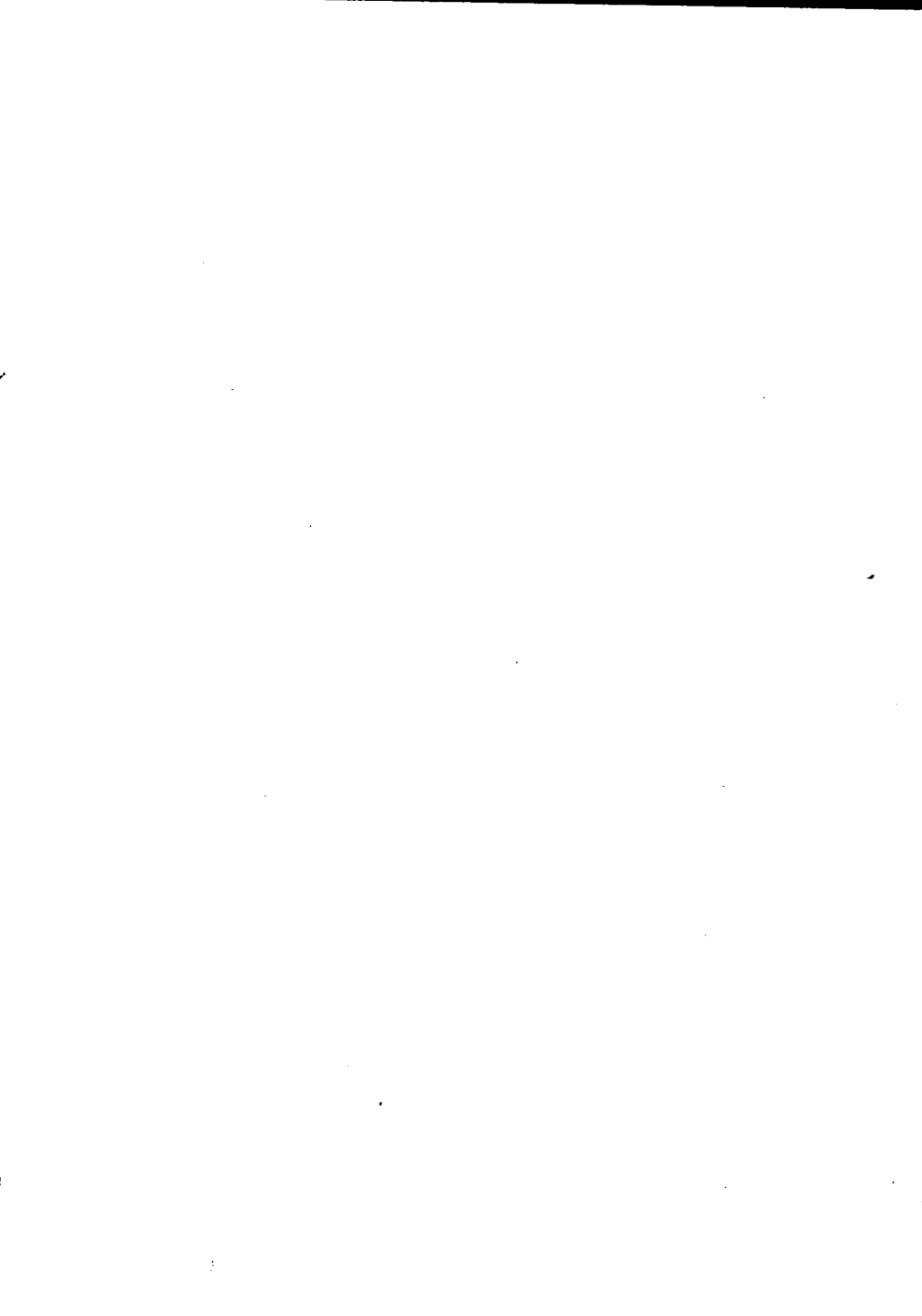


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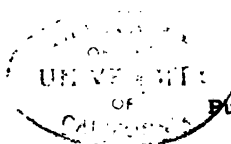


The
Law and Customs
of
Riot Duty

**A Guide For National Guard Officers
and Civil Authorities**

**With
Commentaries on Federal Aid**

By
BYRON L. BARGAR
Of the Columbus, Ohio, Bar
Lt. Col. Ohio National Guard, Retired



Columbus, Ohio
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1907

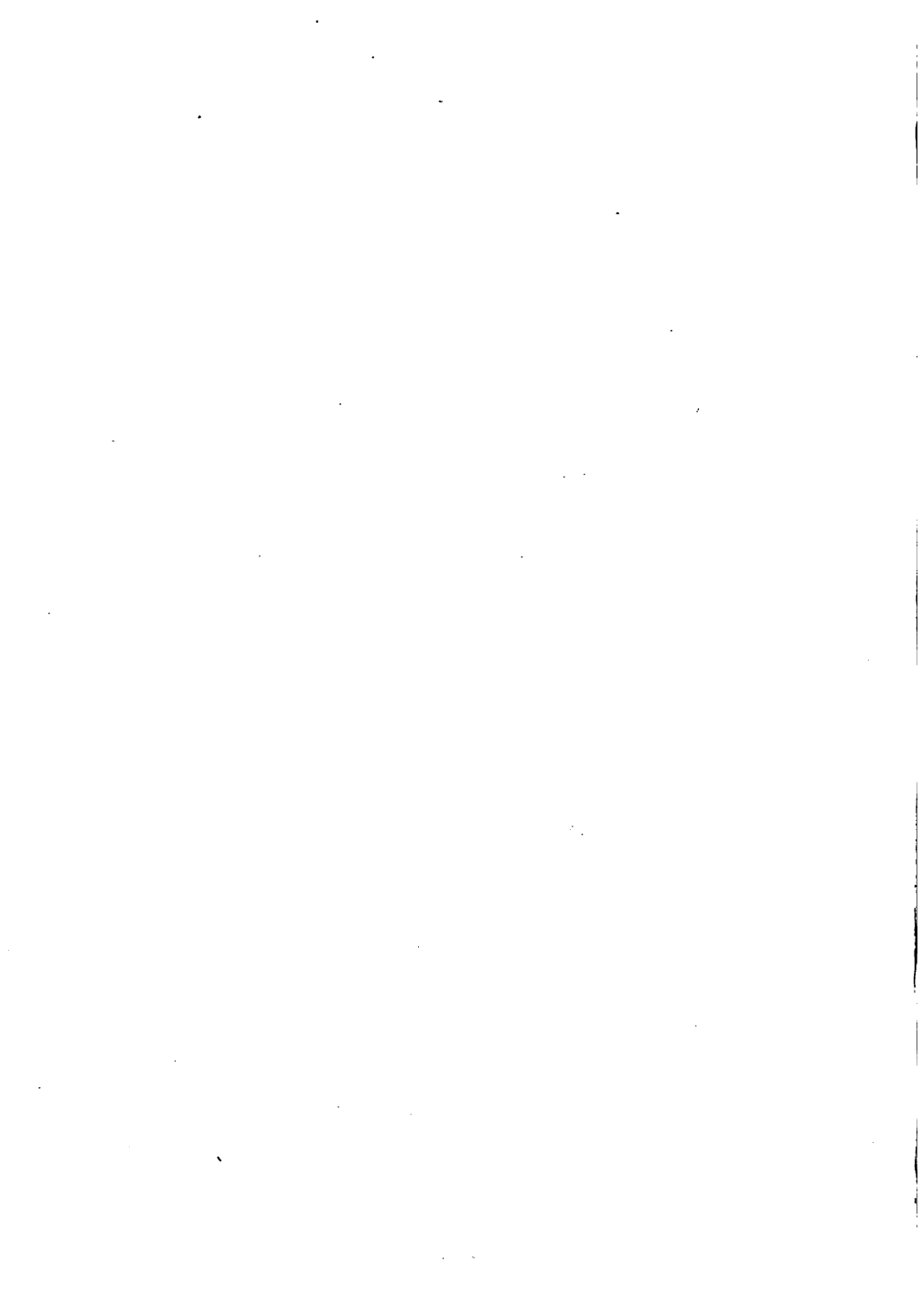
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GENERAL

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BYRON L. BARGAR**

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COLUMBUS, OHIO**

*To
two officers of the civil war,
the grandfathers of my children,
this volume is
affectionately inscribed.*



PREFACE.

The term riot duty, used generically, does not specifically include all forms of domestic disturbance and rebellion in which the aid of troops may be required; but this term is chosen as a title for bibliological reasons, although the scope of the following pages might permit of a more comprehensive title.

It is probably true that riot service is the most distasteful duty which soldiers are called upon to perform. Furthermore it is unfortunate that the first military force called on for this duty is composed of what may be termed amateur soldiers. They have neither the *sang-froid* of the regular, which comes from familiarity with service, nor the independence of action, which comes from the fact that regulars do not take orders from civil officers. These cumulative disabilities have given citizens a dread of riot duty; and this fact is responsible for a part of the difficulty found in keeping the ranks of the national guard filled with good men.

The militiamen feel the responsibility of their position as a reserve power of the state. But they are not always taught how to discharge this responsibility. They acquire a distaste for riot duty because they become confused as to the legal requirements of that duty. They have not the slightest fear of a mob. They dread the *law*. They fear the law because they

are uncertain of its protection ; because to them it is vague, illy defined and, gathered hastily from many sources, is inconsistent and contradictory.

An attempt is made in the following pages to give to the guardsmen and civil authorities a convenient guide to the rules of law which govern riot duty. Recommendations are freely made as to administrative details necessary to keep organized militia in a proper state of preparedness ; as to forms of orders, proclamations and reports ; with suggestions as to tactical employment of troops.

The various details of riot duty are treated, where possible, in the order in which the work is performed, and the legal phase of each situation is stated in connection therewith, so that the student can readily determine his status at each stage of the service. Military terms are used where the context admits.

The principal danger in the application of legal rules to the duties required in riot and insurrection is that these rules may be applied, either by a civil or military officer, to the wrong conditions. Illustrations of this are occasionally furnished in the text. Bearing this in mind, and in order that rules could be concisely stated, this work is so arranged that each legal rule applies to the situation indicated by the chapter and section titles. In reading any rule, a glance at the chapter and section headings enables the reader to grasp an outline of the situation under which the rule applies.

Columbus, Ohio, May 1, 1907.

TABLE OF CONTENTS

CHAPTER ONE.

DEFINITIONS. SCOPE AND SOURCES OF MILITARY LAW.

- SEC. 1. Army and Militia—Legal Difference.
“ 2. National Guard is Militia.
“ 3. Military Law. Martial Law. Military Government.
“ 4. Regulations.
“ 5. Discipline.
“ 6. Dual Powers of Commander.
“ 7. Scope of Commander's Powers.
“ 8. Control of Civilians Who Accompany Troops.
“ 9. Primary Source of Military Law.
“ 10. Other Sources of Military Law.
“ 11. U. S. Orders and Regulations.
“ 12. Customs of the Service.
“ 13. Judicial Decisions.
-

CHAPTER TWO.

PREPAREDNESS.

- Sec. 14. Importance of Preparation.
“ 15. System.
“ 16. Notifying Men.

- " 17. Form of Notice.
- " 18. General Notices.
- " 19. Prepared Proclamations.
- " 20. Ammunition.
- " 21. Equipment.
- " 22. Baggage and Stores.
- " 23. Drills.
- " 24. Instruction in Riot Duty.

CHAPTER THREE.

WHEN TROOPS SHOULD BE CALLED.

- Sec. 25. Constitutions and Statutes Ordinarily Govern.
- " 26. Enforcement of Unconstitutional Laws.
- " 27. Constitutionality of Statutes Governing Calls.
- " 28. The State Constitution.
- " 29. When Chief Executive is Supreme.
- " 30. Civil Officials Have Authority to Decide.
- " 31. Interpretation of Laws.
- " 32. Rebellion and Insurrection.
- " 33. Riot Defined. Mob.
- " 34. Rebellious Mob.
- " 35. Occasions Classified.
- " 36. An Instance of the First Class.
- " 37. An Instance of the Second Class.
- " 38. An Instance of the Third Class.
- " 39. An Instance of the Fourth Class.
- " 40. Importance of Prompt Decision.

- " 41. Use of Federal Militia.
- " 42. Federal Aid.
- " 43. Application for Federal Aid.

CHAPTER FOUR.

ASSEMBLY BEFORE RECEIPT OF ORDERS.

- Sec. 44. Advisability.
- " 45. Regulations.
- " 46. Where no Regulations Exist.
- " 47. Care of Public Property.
- " 48. Cautionary Orders.
- " 49. Conduct of Officers.
- " 50. Conduct of Men.
- " 51. Subsisting Men Before Orders Received.

CHAPTER FIVE.

WHO MAY CALL OUT TROOPS.

- Sec. 52. State Constitutions and Statutes.
- " 53. The President of the United States.
- " 54. The Governor.
- " 55. Other Civil Authorities.
- " 56. Jurisdiction of Minor Civil Authorities.
- " 57. Appeal to Governor.
- " 58. Conflicting Orders for Service.

CHAPTER SIX.

ORDERS AND REPORTS.

- Sec. 59. Written Orders.
- " 60. An Order for Troops.
 - " 61. Form of Order for Troops.
 - " 62. Acknowledging Receipt of Orders.
 - " 63. The First Orders of the Commanding Officer.
 - " 64. Communication With the Governor.
 - " 65. Subsequent Orders from Civil Authorities.
 - " 66. Orders and Reports in General.
 - " 67. Conflicting Orders.
 - " 68. Protection Afforded by Orders.
 - " 69. Interpretation of Orders.
 - " 70. Minors.
-

CHAPTER SEVEN.

CONDUCT OF OFFICERS.

- Sec. 71. In Preparation.
- " 72. The Decision of Legal Questions.
 - " 73. Liability of Municipality.
 - " 74. Conduct Toward Civil Officers.
 - " 75. Conduct Toward Troops.
 - " 76. Conduct Toward Citizens.
 - " 77. Conduct Toward the Mob.
 - " 78. Qualified Martial Law.
 - " 79. Personal Conduct.

CHAPTER EIGHT.

MOVEMENT OF TROOPS.

- Sec. 80. Scouts.
 - “ 81. Civil Authorities Should Meet Troops.
 - “ 82. Detraining.
 - “ 83. Discipline Enroute.
 - “ 84. Marches.
 - “ 85. Transportation.
 - “ 86. Separate Units.
 - “ 87. Travel Rations.
 - “ 88. Baggage.
 - “ 89. U. S. Service.
-

CHAPTER NINE.

AID OF CIVIL AUTHORITIES.

- Sec. 90. Liability to Arrest While Performing Military Service.
- “ 91. Exception to Foregoing Rule.
- “ 92. Another Exception.
- “ 93. When Accountability to Civil Authorities Begins.
- “ 94. Authority of Military Officers.
- “ 95. Act Under Order of Civil Authority.
- “ 96. Self Defense.
- “ 97. Ministerial Duties.
- “ 98. Felonies and Misdemeanors.
- “ 99. Peace-Officers.
- “ 100. Arrest for Felony or Attempted Felony.

- " 101. Force Properly Used Therefor.
 - " 102. Arrest After Escape.
 - " 103. Arrest for Misdemeanor.
 - " 104. Force Properly Used Therefor.
 - " 105. Civil Officers Should Confer Full Powers.
 - " 106. Prevention of Crime.
 - " 107. Affrays.
 - " 108. A Breach of the Peace.
 - " 109. What Constitutes Presence or View.
 - " 110. Military Officers Discretionary Powers.
 - " 111. Resisting Attacks of Mob.
 - " 112. Firing on Mob.
 - " 113. Justifiable Homicide by Citizens.
 - " 114. Homicide When Rioters Resist Arrest.
 - " 115. Protecting Prisoner.
 - " 116. State Statutes Control Riot Duty.
 - " 117. Territorial Limits.
-

CHAPTER TEN.

CO-OPERATION WITH CIVIL AUTHORITIES.

- Sec. 118. Disputes Between Civil Officers.
- " 119. Qualified Martial Law.
- " 120. Degree of Co-operation.
- " 121. Prisoners.
- " 122. Where a Governor Acts Independently of
Civil Authorities.
- " 123. Separating Rioters from Citizens.
- " 124. Concurrent Martial and Civil Law.

- " 125. Habeas Corpus.
 - " 126. Rival Civil Authorities.
-

CHAPTER ELEVEN.

ousting and replacing civil authorities.

- Sec. 127. Governor Decides When Civil Authorities Should be Replaced.
 - " 128. Governor May Act Summarily.
 - " 129. Delegation of Powers to Military Commanders.
 - " 130. Proclaiming Martial Law.
 - " 131. Establishing Martial Law Without Proclamation.
 - " 132. Ouster by Arrest.
 - " 133. Ouster by Independent Action.
 - " 134. Disarming Authorities.
 - " 135. Reinstating Civil Authorities.
 - " 136. Establishment of Military Commissions.
 - " 137. Jurisdiction of Military Commissions.
 - " 138. Invoking Federal Aid.
 - " 139. Control of Federal Troops.
-

CHAPTER TWELVE.

proclamations.

- Sec. 140. Statutory Requirements.
- " 141. Form of Federal Proclamation.

- " 142. Form of a State Proclamation.
 - " 143. Recitals in Proclamations.
 - " 144. Military District Proclamation.
 - " 145. Sheriff's Proclamation.
 - " 146. Special Proclamations.
 - " 147. Forfeiture of Estate.
 - " 148. Final Proclamation.
-

CHAPTER THIRTEEN.

CLOSING SALOONS. ORDER AT NIGHT.

- Sec. 149. Statutes Relative to Closing Saloons.
 - " 150. Where no Statutes Exist.
 - " 151. Military Commander's Duties.
 - " 152. Under Martial Law.
 - " 153. Public Meetings at Night.
 - " 154. Theaters and Places of Amusement.
 - " 155. Ministers.
 - " 156. Curfew.
 - " 157. Maintaining Order at Night.
-

CHAPTER FOURTEEN.

FIRST DISPOSITION OF TROOPS.

- Sec. 158. Marching Through City Streets.
- " 159. Marching on Mob.
- " 160. Preventing a Lynching.
- " 161. Preventing Destruction of Public Property

- " 162. Safeguards.
 - " 163. Barricades.
 - " 164. Machine Guns.
 - " 165. Cavalry.
 - " 166. Artillery.
 - " 167. Medical Department.
 - " 168. General Suggestions.
-

CHAPTER FIFTEEN.

SUBSISTING, QUARTERING AND PAYING TROOPS.

- Sec. 169. Subsisting Troops in Federal Service.
 - " 170. Federal Service—Emergency Subsistence.
 - " 171. State Statutes and Regulations.
 - " 172. Emergency Subsistence Without Orders.
 - " 173. Billeting Troops.
 - " 174. Canvas.
 - " 175. Quartermaster's Duties.
 - " 176. Officer's Servants.
 - " 177. Paying Troops.
-

CHAPTER SIXTEEN.

TACTICAL USE OF TROOPS.

- Sec. 178. In Federal Service.
- " 179. Federal Statutes.
- " 180. State Statutes.
- " 181. Tactics—Definition of.

- " 182. State Regulations.
- " 183. Tactics in Aid of Civil Authorities.
- " 184. Tactics Under Qualified Martial Law.
- " 185. Tactics Under Co-operative Martial Law.
- " 186. Tactics Under Absolute Martial Law.
- " 187. Use of Bayonet.
- " 188. Use of Blank Cartridges.
- " 189. Safeguards and Outposts.
- " 190. Guarding Large Areas.

CHAPTER SEVENTEEN.

MARTIAL LAW.

- Sec. 191. Definition.
- " 192. Absolute Martial Law.
- " 193. Co-operative Martial Law.
- " 194. Qualified Martial Law.
- " 195. Civil Law.
- " 196. Insurrection and Rebellion.
- " 197. Status of Insurgents.
- " 198. Elasticity of Martial Law.
- " 199. Necessity for Martial Law.
- " 200. State Powers.
- " 201. President's Powers.
- " 202. Territorial Governors' Powers.
- " 203. Exercise of Absolute Martial Law.
- " 204. Principal Rules.
- " 205. Right of Search.
- " 206. Jurisdiction of Civil Courts.
- " 207. Administration of Martial Law.

- " 208. Punishments.
- " 209. Exercise of Co-operative Martial Law.
- " 210. Exercise of Qualified Martial Law.
- " 211. Establishing Qualified Martial Law.
- " 212. Preventing Violation of Statute.
- " 213. Safe-conducts.
- " 214. Provost Courts.
- " 215. Provost Marshals.
- " 216. Provost Officers.

CHAPTER EIGHTEEN.

HABEAS CORPUS.

- Sec. 217. Federal Constitutional Provisions.
- " 218. Habeas Corpus Defined.
- " 219. Suspension of Writ Defined.
- " 220. In Aid of Civil Authorities.
- " 221. Under Qualified Martial Law.
- " 222. Under Co-operative Martial Law in State Service.
- " 223. Form of Return on Writ.
- " 224. Illustration Under Co-operative Martial Law.
- " 225. Under Co-operative Martial Law in Federal Service.
- " 226. Under Absolute Martial Law in State Service.
- " 227. Under Absolute Martial Law in Federal Service.
- " 228. State Court Writ Suspended, in Peace, in Federal Service.

CHAPTER NINETEEN.

TAKING PRIVATE PROPERTY.

- Sec. 229. In Aid of Civil Authorities.
 - “ 230. Under Qualified Martial Law.
 - “ 231. Under Co-operative Martial Law.
 - “ 232. Under Absolute Martial Law.
 - “ 233. Military Control Over Public Property.
 - “ 234. Private Property of Prisoners.
 - “ 235. Destruction of Crops.
 - “ 236. Ground for Encampments.
 - “ 237. Provisions.
 - “ 238. Compensation.
 - “ 239. Private Property of Officers and Enlisted Men.
-

CHAPTER TWENTY.

LIABILITY OF OFFICERS UNDER CIVIL LAW.

- Sec. 240. Protection Afforded by Governor's Orders.
- “ 241. Necessity for Proof.
- “ 242. In Aid of Civil Authorities.
- “ 243. State Riot Statutes. Oppressive Acts.
- “ 244. Under Qualified Martial Law.
- “ 245. Protection Afforded by President's Orders.
- “ 246. Officers Discretionary Powers, Federal Service.
- “ 247. Under Co-operative Martial Law in Federal Service.

- " 248. Under Co-operative Martial Law in State Service.
 - " 249. Under Absolute Martial Law.
 - " 250. For Unnecessary Violation of Statute.
 - " 251. For Necessaries for Troops.
 - " 252. For Property Strategically Destroyed.
 - " 253. For Trespass by Subordinate.
 - " 254. In Pari Delicto.
 - " 255. For Frauds in Service.
 - " 256. In Suit by Soldier.
-

CHAPTER TWENTY-ONE.

LIABILITY OF ENLISTED MEN UNDER CIVIL LAW.

- Sec. 257. When Liability Begins.
 - " 258. General Rule.
 - " 259. Sentries, General Rule Under Military Law.
 - " 260. Sentries, General Rule in Aid of Civil Authorities.
 - " 261. Sentries, General Rule Under Martial Law.
 - " 262. Habeas Corpus.
 - " 263. Twice in Jeopardy.
-

CHAPTER TWENTY-TWO.

MILITIA IN U. S. SERVICE.

- Sec. 264. Laws and Regulations Governing.
- " 265. Statutory Authority For.
- " 266. How Selected.

- " 267. Pay and Pensions in Federal Service.
 - " 268. Company Minimum Accepted.
 - " 269. Officers.
 - " 270. State Property.
 - " 271. Horses.
-

CHAPTER TWENTY-THREE.

REPORT OF TOUR OF DUTY.

- Sec. 272. Reports Are Historical Details.
- " 273. General Requirements.
- " 274. Staff Reports.
- " 275. Medical Officers Report.
- " 276. Commissary Officers Report.
- " 277. Quartermaster's Report.
- " 278. Summary Court Officer's Report.
- " 279. Judge Advocate's Report.
- " 280. Under Martial Law.
- " 281. Fairness.

CHAPTER ONE.

DEFINITIONS. SCOPE AND SOURCES OF MILITARY LAW.

1. ARMY AND MILITIA—LEGAL DIFFERENCE.

The Constitution of the United States makes a broad distinction between the militia and the armies referred to in it: the powers conferred upon Congress, and denied to the States, in reference to the one, being widely different from the powers conferred and denied in reference to the other. And, indeed, the two words could not properly have been used to convey the same idea. An army is a body of men whose business is war; the militia, a body of men composed of citizens occupied ordinarily in the pursuits of civil life, but organized for discipline and drill, and called into the field for temporary military service when the exigencies of the country require it. (1)

2. NATIONAL GUARD IS MILITIA. The terms national guard and militia, with reference to their official acts, may be treated as synonymous. The organized militia is commonly termed the national

(1) *Burroughs v. Peyton*, 16 Gratt. (Va.) 475; Pars. 1744, 2450 Dig. Opin. J. A. G., Edn. 1901.

SCOPE OF MILITARY LAW.

guard, but perhaps all federal and state statutes provide for the use of the unorganized militia in emergencies. When it is so used it must be first organized, and it can then be properly termed a part of the national guard. (2)

3. MILITARY LAW. MARTIAL LAW. MILITARY GOVERNMENT. In the mind of the guardsmen three terms are often confused, namely: military law, martial law and military government. It is therefore well, at the outset, to point out the fact that these three terms have separate and distinct meanings. The briefest way to do this is to define each and show its relation to the others. Military law is the law that governs the soldier, at peace and in war, at home and abroad. Martial law is the law enforced by a military commander, over the civilians in his district, whenever the civil authorities are unable to maintain peace and order or enforce the laws. This district, however, must be a part of the same country to which the military commander owes allegiance. If the same military commander penetrates a foreign country, in time of war, and assumes jurisdiction over civil affairs, his control is then called military government, instead of martial law. In other words, martial law is exercised over territory of the state enforcing it; while military

(2) See Act of January 21, 1903, 32 U. S. Stat. 775; Pars. 1729-1731 Dig. Opin. J. A. G., Edn. 1901.

SCOPE OF MILITARY LAW.

government is exercised only over enemy territory. An officer exercising military government is responsible only for breach of the laws and customs of war; but an officer enforcing martial law is liable for illegal acts, not only to his military superiors, but to persons who may seek redress by civil action as soon as the courts are again in working order, and to criminal actions instituted by civil officers under the general laws of his state. (3)

4. REGULATIONS. While all law is regulation in a greater or less degree, regulations proper, whether army regulations or other, are administrative rules or directions as contrasted with statutes. (4)

5. DISCIPLINE. Disciplinary punishments are those imposed at the will of military commanders without the intervention of courts-martial. (5) A recent military work defines discipline as: "That element in an army which insures prompt obedience to orders, regulations and the will of the commander." (6) Discipline therefore means controlled behavior.

(3) Birkhimer, Mil. Gov. and Mar. Law pp. 21, 22; Cooley's Constitutional Limitations, p. 379 *et seq.*

(4) Winthrop's Mil. Law and Prec., Edn. 1896, p. 17.

(5) Winthrop's Mil. Law and Prec., Edn. 1896, p. 678.

(6) Mil. and Naval Dictionary, Wisser and Gauss.

SCOPE OF MILITARY LAW.

6. DUAL POWERS OF COMMANDER. A commander of troops on service will often be compelled to act in two distinct capacities. (a) He must govern his troops by the rules of military law. (b) He may be compelled to act as governor of the district he occupies and must then impose such laws or rules on the inhabitants as, in his opinion, are necessary to secure the safety of his army, and also the good government of the district which, by reason of the war, riot or rebellion, may for the time have been deprived of its ordinary rulers and the machinery for maintaining order. This latter control is called martial law; unless the troops are in a foreign country, where it becomes military government.

7. SCOPE OF COMMANDERS' POWERS. The orders issued by a commander of militia should at all times conform to law. He has no greater right to issue an unlawful order to a militiaman than to any other citizen. (7)

8. CONTROL OF CIVILIANS WHO ACCOMPANY TROOPS. Certain civilians who accompany a force in the field, in time of war, are also subject to military law, such as civilians serving with the force in an official capacity; persons accompanying the troops with special leave, such as newspaper correspondents and contractors; persons employed with

(7) *Cooke v. Cole*, Rap. Jud. Que. 22 C. S. 25.

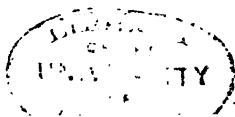
SCOPE OF MILITARY LAW.

the troops, such as teamsters and packers; other persons known as followers, who accompany the troops either as sutlers or on business or pleasure with the permission of the commander. (8)

9. PRIMARY SOURCE OF MILITARY LAW. The states, composing the United States of America, in ratifying the U. S. Constitution, thereby delegated to the federal government the power:

“To provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States, respectively, the appointment of the officers, and the authority of training the militia according to the

(8) 63 Art. of War. The accepted interpretation of this article is that it subjects (in time of war) the classes of persons specified not only to military discipline and government in general, but also to the jurisdiction of courts-martial (upon the theory, probably, that they are thus made, for the time being, a part of the army). Individuals, however, of the class termed “retainers to the camp,” or officers’ servants and the like, as well as camp followers generally, have rarely been subjected to trial in our service. For breaches of discipline committed by them the punishment has generally been expulsion from the limits of the camp and dismissal from employment. Dig. Opin. J. A. G., par. 161. The jurisdiction authorized by this article cannot be extended to civilians employed in connection with the army in time of peace. Ibid., par. 165.



SCOPE OF MILITARY LAW.

discipline prescribed by Congress.” (9)

For military law governing the militia the student should first look to the federal constitution and the laws of Congress. Here difficulty is encountered, because many acts of Congress, intended for the “armies” of the United States, have been tacitly adopted by some states as the “discipline prescribed by Congress” for the militia. Many of these same acts of Congress, notably the Articles of War, are deficient in direct application to militia in state service, and it is questionable whether the Articles of War were intended to so apply. This uncertainty arises because of the express congressional provision that:

“The *armies* of the United States shall be governed by the following rules and articles” (referring to the articles of war).

(10) Now if the word “armies” does not include militia in state service, then can it be said that the articles of war are a part of “the discipline prescribed by Congress” for the militia?

The act of January 21, 1903 (11) expressly provides that:

“The militia, when called into the ac-

(9) U. S. Const., Art. One, Sec. VIII, par. 16.

(10) Sec. 1342, U. S. R. S., being a preamble to A. W.

(11) Act of January 21, 1903, known as the Dick Law, 32 U. S. Stats., p. 775.

SCOPE OF MILITARY LAW.

tual service of the United States, shall be subject to the same rules and articles of war as the regular troops of the United States."

This provision would not have been necessary if the militia was clearly a part, or one, of the "armies" of the United States. The provision just quoted is substantially a repetition of the sixty-fourth article of war, and is clearly superfluous.

Prior to January 21, 1903, Section 1637, U. S. R. S., provided that:

"The system of discipline and field exercise which is ordered to be observed in the different corps of infantry, artillery and riflemen of the regular army, shall also be observed in such corps, respectively, of the militia."

But this section was repealed in the passage of the Dick Act and it cannot now be relied on as prescribing that the articles of war shall govern the militia in state service. If it heretofore bore that badly strained construction, then it now seems that Congress has inadvertently failed to maintain the exercise of its right to prescribe rules of "discipline" for the militia. Section three of the Dick law does provide, however, that the discipline of the militia shall be that of the army by January 21, 1908. This provision seems to furnish a reason for concluding

that Congress did not refer to the articles of war by the provisions of Section 1637, R. S.

This act of Congress of January 21, 1903, however, first gave the organized militia a legal right to exist, under the U. S. Constitution, as a state force. In addition to this right to exist, the act provided for the use of this same state force by the president; so that now it is possible to so interpret the word "armies," in the preamble to the articles of war, that it will include organized militia.

Many of the states have adopted, or attempted to adopt, the articles of war as a part of their respective military codes. The scope of this work does not permit of an extended treatment of this question; but the foregoing points will be valuable as route maps for further investigation.

10. OTHER SOURCES OF MILITARY LAW. In state service the constitution and statutes of the guardsman's own state are, next to the U. S. Constitution and militia statutes, the most authoritative sources of military law in that state. Next come the state orders,—general and special,—thence down through the organizations to the unit to which the officer or enlisted man belongs or is attached. Where these state orders are inadequate, most states direct that the U. S. orders and regulations shall govern. This is done in conformity to the Dick law, and is a well-considered attempt to secure

SCOPE OF MILITARY LAW.

the greatest possible uniformity in state systems. Absolute uniformity and absolute conformity to federal statutes will be impossible until the federal government takes as full control of the militia as its constitution permits.

11. U. S. ORDERS AND REGULATIONS. When militia is mustered into U. S. service, the control of the state ceases and the U. S. orders and regulations take precedence over all state statutes and orders.

12. CUSTOMS OF THE SERVICE constitute the unwritten military law. A custom of the service, in order to become effective as a rule of conduct or action, must consist of a uniform known practice of long standing, which is also certain and reasonable, and is not in conflict with any constitutional provision, existing statute, or order. It must be so long continued and notorious that all persons concerned may be presumed to have knowledge of it. (12)

13. JUDICIAL DECISIONS. These have an important bearing on the conduct of the national guard when performing riot duty. Many courts have laid down rules for the guidance of the guards-

(12) Winthrop's Military Law and Precedents, Edn. 1896, p. 44; U. S. v. Duval, Gilpin 356; Collins v. Hope, 3 Washington, 149; U. S. v. Buchanan, 8 Howard, 102; 2 Greenleaf's Evidence, 251; Lawson on Usages and Customs, 2-15; Wadley v. Davis, 59 Barb., 503.

SCOPE OF MILITARY LAW.

man. Probably the most important of these rules grow out of the provision in the state constitutions that the military shall be subordinate to the civil power. Where, as may sometime happen, the civil power in any district insists on a violation of law, it is apparent that the military should no longer be subordinate. But this prescribed subordination sometimes renders a soldier liable in either civil or criminal actions in the state courts, in cases where he has exceeded his authority or acted without any. These judicial decisions will be cited hereafter in connection with the duties to which they relate.

CHAPTER TWO.

PREPAREDNESS.

14. **IMPORTANCE OF PREPARATION.** When war was declared between France and Germany, in 1870, the German chief of the general staff simply pointed to a cabinet drawer. An aide took a few papers from it and the machinery of war was in motion so smoothly, perfectly and uncontrollably that the German armies rolled across France without a halt.

When troops are called for active service it is too late to prepare. It is time to go. This is especially true of militia called for riot duty. Celerity is then often of the highest importance. Lives and property may be destroyed while officers are making frantic efforts to repair their negligence in not preparing for the very emergency for which they were mustered.

15. **SYSTEM.** The national guard statutes of many of the states direct officers to notify their men for riot or state duty in a particular manner. Men so notified must instantly comply or they may be punished by both the military and civil courts. But the company commander must bear in mind that it requires proof to convict any accused person. In the excitement of calling men for riot duty, it is

PREPAREDNESS.

essential that each man receive a notice which the man knows to be legally sufficient. He should also clearly understand the penalties for disobedience and the disgrace of refusing to respond. A record should be made showing positively that each man received a copy of the notice. These things sound like troublesome details, but on the contrary they are exceedingly simple. System is the *vade mecum*.

16. NOTIFYING MEN. One system of notification is to divide the men of a company into four (or more) sections, corresponding to the quarters or districts where they reside. Give each district to a sergeant and a corporal. These two men are then required to keep triplicate lists of the home address of every man living in their district; and the business address of every man employed in their district. Each non-com. must habitually carry one list, the third being kept in the company quarters. These triplicate lists must be constantly up to date. In this method a man may be on two lists—if he lives in one district and works in another—but that is unavoidable.

In addition to the address lists, each of the men who carry them must have a supply of the printed notices referred to in the next section. He can keep a supply at home and one at his place of business—both carefully secured.

When a call for duty comes the company com-

PREPAREDNESS.

mander must reach one or both non-coms. in each district. He does this by phone or messenger or both. The non-coms. then at once notify the men. Each man serving notices will carry one notice on which is written: "Received copy of the within notice thisday of 190.." The date will be filled in as the non-com. starts on his round. If both non-coms. are available, they can divide the district by a preconcerted arrangement. All men who can be reached by phone will be first ordered in. Every man served with a notice will sign the copy retained by the non-com..

During business hours the business addresses will be first used. It is more difficult to find men between seven and ten P. M. than at any other time. If a man to be notified is not at home, not at work and cannot be found, a member of his family should be required to sign the receipt for notice and a copy will then be left at the house with positive directions that the copy be served at once. The non-com. can check his list and later make report of method of service on men who do not report at armory.

If the list, receipt and notices are ready when the call for duty comes, an immense amount of worry and confusion will be avoided. No writing need be done except the signature of the men and the completion of date of the receipt.

PREPAREDNESS.

17. **FORM OF NOTICE.** The notice to be served, under a plan similar to the one outlined in section sixteen, should be entirely printed. It should be addressed: "To Any Enlisted Man of Co., Infantry, N. G.," As it commands the recipient to report forthwith at his armory, it needs no date. In states where statutes prescribe notices, the notice should conform to the statute.

Such printed notice should contain statements showing the importance of obeying it. The following form might be used, changed to suit the state law:

"NOTICE

(Under Section 3098, Revised Statutes of Ohio.)

Columbus, Ohio.

To Any Enlisted Man

of Co. I, 4th Inf'y., O. N. G.

You are ordered into active service of the State of Ohio, and will report at once to your company commander at the company armory:

By order Commanding Officer Co. I, 4th Inf'y.,
O. N. G.

HAROLD M. BUSH,
Capt. 4th Inf'y., O. N. G.

Commanding Co. I.

This notice to be used only when troops are called out in aid of civil authorities. It must then be handed to each man of the company in person; or

PREPAREDNESS.

if man cannot be found, it should be left at his usual place of residence and its importance explained to the persons found there, who should then at once take steps to notify the man addressed that such a notice has been served. Promptness is of the utmost importance.

Section 3099, R. S.—‘Every enlisted man who refuses or neglects to serve such notice, when duly ordered so to do, and every officer or enlisted man who, having been served with notice as provided in the preceding section, refuses or neglects to obey the same PROMPTLY, shall pay not less than ten nor more than one hundred dollars.’ ”

18. GENERAL NOTICES. In addition to lists suggested in section sixteen, each company commander should have posted in his armory, at all times, a full and complete roster of his organization. This roster should disclose the residence addresses, places of employment, whether day or night; nearest available telephone and places where men may be found when not at home or at work. Regimental and battalion commanders should keep the same kind of a roster for their officers. Arrangements should be made by commanding officers for riot signals to be sounded by fire alarm, court house or town hall bells, or by steam whistle. All officers and men should be taught to recognize these signals.

PREPAREDNESS.

19. **PREPARED PROCLAMATIONS.** The statutes of the United States, relative to federal aid to states in domestic disturbances, provide specifically for a preliminary proclamation to the disorderly elements of a community which the civil power has proved inadequate to control. Officers of state troops, whose troops would be first employed in the same service, would doubtless do well to cause civil officers to use a similar proclamation, unless the laws or regulations of their state prescribe another form. It would be well to have a form of proclamation outlined in advance of an emergency which would require its use. This subject is treated, and forms are suggested, in chapter twelve.

20. **AMMUNITION.** A supply of at least two thousand rounds per company should always be kept ready for instant issue. Multiball cartridges, if available, should be issued for street service as the service bullet may penetrate the walls of private dwellings or wound some citizen a mile or so from the scene of trouble. If the company has its full complement of officers, one should be put in charge of the ammunition. This officer should pay close attention to any recruits who are called out before having fired the service rifle or are awkward in handling it. He should also look over all the rifles. Men sometimes take rifles into the field with the firing pins and strikers so gummed with hardened

PREPAREDNESS.

oil that the rifles cannot be fired before careful cleaning. A rifle in this condition will pass inspection unless snapped.

21. **EQUIPMENT.** If each man's entire field equipment is issued and kept in an individual locker, the equipment question narrows down to the issuance of an order designating what is to be carried. This order should also indicate what clothing will be worn and how much ammunition will be issued. Everything should be ready for heavy marching order. If equipments are not issued and kept in individual lockers a carefully considered order should be constantly kept posted in the property room, designating, briefly, how the issue will be made when a call for duty comes.

22. **BAGGAGE AND STORES.** Orders as to baggage and subsistence may or may not be issued to the company commander. If order for service requires an immediate movement of the company, its commander must move first and arrange baggage and subsistence details afterward. In such an emergency he must do the best he can with reference to the probable character of the service. But in order to do this he must have everything ready to be carried with the company or sent to it. The range and cooking utensils should always be packed ready for shipment and always be clean enough to pass an inspection. Immediately after every tour of camp

PREPAREDNESS.

or other duty the company commander should not rest until everything is ready for the next trip. Then, with his conscience cleared by the prepared feeling, he can rest both mentally and physically. Tools, crated lanterns, oilcan, canvas and field desk should have the same attention as the range. An itemized grocery order, equal to a two days' ration return for the probable strength of the command, should be kept in the field desk. If the cook shop is carried and the regimental commissary fails, or the company is acting alone, this order will be very useful.

23. DRILLS. The U. S. Infantry drill regulations of 1904 omit the old formation known as street column, which is found in the preceding drill regulations. This formation was intended for use in riot duty and has been so used successfully. In marching down a street where a mob is likely to be encountered this column should be preceded by an advance guard and followed by a rear guard, both of peculiar formation. This subject will be treated in chapter sixteen.

Target work is an important part of the preparation because every man should have enough familiarity with the rifle to enable him to use it with effect on his opponents and without danger to himself and comrades.

The bayonet exercises are also omitted from the

PREPAREDNESS.

1904 drill regulations, but will probably be incorporated in future editions. They are especially important in riot duty as they teach the proper use of the butt end of a rifle. The butt of a rifle on the toes of the front rank of a crowd is occasionally more effective and less injurious than bayonets presented at the owners of the toes.

Cavalry horses are useless in riot duty unless properly trained. They must not only be accustomed to the use of sabres and pistols, but also rendered fearless of fire crackers exploding about their feet. Fire crackers are a favorite resort of a mob against cavalry. Boys are employed to use them and, if cavalry is successfully dispersed thereby, the moral effect is bad for the guard. In instructing the cavalry horses it is necessary to control them with the reins, legs and spurs only; never speaking to or striking the horse. The horseman should accustom his mount to hear his voice in commands to individuals and to shouting generally. The horse should be taught to knock down and trot over a stuffed figure of a man and not to refuse low obstructions and bad ground. It is a psychological fact that a horse fears his ability to encounter a difficulty whenever the rider exhibits the same distrust. If the rider thinks that a horse can take a certain fence, or makes the horse believe that he thinks so, the horse will try the jump. But if the

man rides at a fence in a doubtful mood as to his mount's ability to clear it, the horse, by some mystic instinct, feels the same doubt and refuses the jump. This same principle applies to all details of training.

Machine guns will often be used in riot duty and other arms of the service should consider plans of effective co-operation. Suggestions are made in chapter sixteen which may serve to indicate the preparatory drill work for riot duty.

24. INSTRUCTION IN RIOT DUTY. The foregoing sections of this chapter indicate what preparation should be made for the performance of riot duty. The succeeding chapters will attempt to outline rules showing how and when the duties should be performed. But all men need practical instruction in the performance of new duties. If one wants his watch repaired he don't take it to a carpenter. If he did the carpenter would probably decline the job.

It should be apparent that the guardsman, in order to be prepared for riot duty, must know how and when to perform its very important details.

Schools of instruction are, therefore, an important part of the preparation necessary for the successful performance of the duties likely to be assigned. In these schools the various difficulties suggested may be studied, discussed and, in a great degree, overcome. A fence doesn't look nearly so high after

PREPAREDNESS.

you have commenced to climb it or tear it down.

The effect of these schools will be to overcome the dread of this most distateful of a guardsman's duties. By familiarity with the subject the nervous apprehension of a mistake disappears.

CHAPTER THREE.

WHEN TROOPS SHOULD BE CALLED.

25. CONSTITUTIONS AND STATUTES ORDINARILY GOVERN the question as to when state troops shall be called for state service. The constitutional and statutory provisions of the different states are so variant that students are necessarily referred to these provisions of their own state. It must be borne in mind that the statutes are subject to occasional change.

26. ENFORCEMENT OF UNCONSTITUTIONAL LAWS. The fact that a statute is unconstitutional does not disqualify the proper civil authorities from calling troops to enforce such a statute. (1) This question was decided in 1857 and there seem to be no adverse decisions. Indeed it would be beyond reason to ask militiamen to settle the constitutionality of laws which they are called under arms to enforce.

27. CONSTITUTIONALITY OF STATUTES GOVERNING CALLS. But where the constitution of a State goes so far as to prescribe that the militia shall not be called into service except in case of rebellion or

(1) *Ela. v. Smith*, 71 Mass. (5 Gray) 121, 66 Am. Dec., 356.

WHEN TROOPS SHOULD BE CALLED.

invasion and then only when the legislature shall declare that the public safety requires it; the statutes of that state may not prescribe other purposes for which the troops may be called. (2)

28. THE STATE CONSTITUTION is the highest law in the state. When the governor takes his oath of office he swears that all the powers vested in him by the constitution, either civil or military, will be exercised by him for the purpose of preserving the constitution and enforcing the law that is there written.

The plain provisions of a state constitution may be fearlessly carried out by the state's chief executive. (3) The courts cannot rightfully interfere with his exercise of constitutional powers. This is because the courts themselves derive all the powers they possess from the same constitution under which the governor acts. Furthermore, it is certain that when the constitution vests the governor with the power, and charges him with the duty, to suppress insurrection, it makes him the final judge as to whether a state of insurrection exists or not. (4)

(2) Green v. State, 83 Tenn. (15 Lea) 708.

(3) 6 A. & E. Ency. of Law (2nd Edn.) p. 928; Story on the Constitution (Vol. 1) Sec. 425; Luther v. Borden, 7 Howard 1, 43.

(4) Cooley's Constitutional Limitations (4th Edn.) p. 50; Appeal of Hartranft et al., 85 Pa. St. 433.

WHEN TROOPS SHOULD BE CALLED.

29. WHEN CHIEF EXECUTIVE IS SUPREME.

When a state constitution does not say that the governor shall aid the local civil authorities with the militia forces to subdue or suppress insurrection; but does empower such governor to "suppress insurrection;" no statute can lawfully be passed which will constitutionally deprive the governor of the power to use the state forces in the suppression of insurrection, without aid or supervision by the other civil authorities of the state. The governor may, when such extreme emergencies arise, supplant the civil authorities of a district or county and establish a military district therein until law and order are restored. (5)

30. CIVIL OFFICIALS HAVE AUTHORITY TO DECIDE. It has been shown in section twenty-eight that the governor shall decide when the moment for calling troops has arrived, provided the constitution and statutes authorize him to make such call. It has also been decided that, where these same laws authorize other civil authorities to call out troops, the authorities so authorized have the power to determine when a call shall be made. For instance: The determination of the mayor of a city, that a

(5) Appeal of Hartranft et al., 85 Pa. St., 433; In re Moyer, 85 Pac., 190; In re Boyle, 57 Pac., 706, 707; Anderson v. Dunn, 6 Wheat. (U. S.), 204-206; Martin v. Mott, 12 Wheat., 31.

WHEN TROOPS SHOULD BE CALLED.

riot or mob is threatened, is conclusive that the exigency exists, under the statute which authorizes him to call out the militia to aid the civil authority in enforcing the laws. (6)

31. INTERPRETATION OF LAWS. In reading the laws which direct when state troops shall be called, it becomes important, before following their mandates, to determine the legal meaning of certain terms there used. Those most commonly used have been defined by the courts as follows:

32. REBELLION AND INSURRECTION. Rebellion "means such an insurrection against lawful authority as is void of all appearance of justice." (7) Rebellion and insurrection are synonymous except in the extent of the disturbance. (8)

Insurrection is the rising of people in arms against their government, or a portion of it, or against one or more of its laws, or against an officer or officers of the government. It may be confined to mere armed resistance, or it may have greater ends in view. (9)

(6) *Ela v. Smith*, 71 Mass. (5 Gray) 121, 66 Am. Dec. 356.

(7) *Hubbard v. Harnden Express Co.*, 10 R. I., 244, 247.

(8) *State v. McDonald* (Ala.) 4 Port., 449, 455.

(9) *Anderson Law Dict.*; *Bouvier L. Dict.*; *Century Dict.*; *Standard Dict.*; *Lieber Instructions for Government of Armies of the United States in the Field* (1863), par. 149; *Field Service Regulations*, U. S. A. (1905) par. 809.

WHEN TROOPS SHOULD BE CALLED.

Insurrection closely resembles rebellion, of which in fact it is an incipient form, in that it is a movement directed against the existence of the government. It is distinguished from rebellion in that the movement is less extensive and its political or military organization is less highly developed. (10)

33. RIOT DEFINED. MOB. A riot is a tumultuous disturbance of the peace by three persons or more, assembling together at their own authority, with the intent mutually to assist one another against all who shall oppose them, and afterward putting the design into execution in a turbulent and violent manner, whether the object in question be lawful or otherwise. (11) What is meant by a

(10) Prize Cases, 2 Black (U. S.) 635; 17 L. ed. 459; The Ambrose Light, 25 Fed., 408; Lieber Instructions for Government Armies of the United States in the Field (1863), par., 157. The recognition of the insurgents by foreign powers, or by the government against which the insurrectionary movement is directed, gives to the undertaking the legal and political character of a rebellion. The Three Friends, 166 U. S. 1, 17 S. Ct. 495, 41 L. ed., 897; Page v. U. S., 11, Wall. (U. S.) 268, 20 L. ed., 135; Prize Cases, supra; Rose v. Himely, 4 Cranch (U. S.) 272, 2 L. ed., 608; The Ambrose Light, supra; Adlay's Wheaton 27b; Dana's Wheaton 23 note 15; Hall Int. L. 5; 22 Cyc., 1452; see Sec. 196.

(11) State v. Stalcup 23, N. C. 30, 31, 35 Am. Dec., 732; Marshall v. City of Buffalo, 64 N. Y. Supp. 411, 413; People v. Judson (N. Y.) 11 Daly 1, 83; State v. Russell, 45 N. H., 83, 84.

WHEN TROOPS SHOULD BE CALLED.

disturbance of the peace can usually be determined by the circumstances attending the assembly of the persons uniting in the tumult. Thus, if a dozen men assemble in a forest, and blow horns or shoot guns, it would not be a riot. But if the same party assembles at midnight in a city, and marches through the streets doing these things and yelling "fire" and other alarming words, few judges would hesitate to pronounce it a riot. (12) The term "riot" is practically synonymous with "mob." (13) Thus where the evidence authorized a finding that accused had been guilty of violence, but it did not appear that the act was committed in concert with any other person or as a result of conspiracy, a conviction for riot was unauthorized. (14)

34. **REBELLIOUS MOB.** The difference between a rebellious mob and a common mob is that the first is in treason and the latter a riot. The mob wants the universality of purpose to make it a rebellious mob or treason. (15)

35. **OCCASIONS CLASSIFIED.** There are commonly four general classes of emergencies in which state troops may or should be called for active serv-

(12) *State v. Brazil* (S. C.) Rice, 257, 260.

(13) *Marshall v. City of Buffalo*, 50 N. Y. App. Div., 149, 153.

(14) *Turner v. State*, 48 S. E., 312, 120 Ga., 350.

(15) *Harris v. N. Y. Mutual Ins. Co.*, 50 Pa. (14 Wright) 341, 350.

WHEN TROOPS SHOULD BE CALLED.

ice by the proper authorities. These are in addition to the right which a state has under the federal constitution to repel invasion, which does not come within the scope of this work. (16) The four general classes are:

1. To prevent a threatened violation of law which the civil authorities of a city or county are inclined to permit.

2. To prevent a threatened violation of law and preserve order when the city or county authorities apprehend a disturbance with which they will be unable to successfully cope.

3. To enforce the laws and restore order when the civil authorities of any district are unable to do so.

4. To enforce the laws and restore civil government in a district in which the civil authorities have been acting in conjunction with others in producing the disturbances.

36. AN INSTANCE OF THE FIRST CLASS arises where a certain act, such as a prize fight, is prohibited by statute, but the local authorities have given permission for the fight to occur. In such a case, if the governor's constitutional rights are broad enough, he may plainly inform the civil authorities that he will use military force to prevent the arranged fight unless the local authorities withdraw

(16) U. S. Const. Art. 1, Sec. 10, par. 3.



WHEN TROOPS SHOULD BE CALLED.

their permission and prevent the fight without the governor's intervention.

In acting in this class of occasions the governor must be clearly within the rights prescribed by the state constitution and constitutional statutes. If he is authorized to act in this class of occasions he may exercise a supervision over civil officers, in various localities, which is often of great benefit to the state. He may prevent many disasters by forbidding the minor evils which, by teaching disregard for law and order, often lead to later disturbances.

37. AN INSTANCE OF THE SECOND CLASS occurs where certain turbulent and lawless elements in a community have been stirred up either by yellow journalism or other public means, to a point where they show disregard for the civil authorities and the law, and plainly intimate their intention to act, as a mob, to accomplish some specific purpose. All constitutions and laws should be broad enough to permit civil authorities to prevent, by military force, these threatening calamities. And when these laws so permit, it is the duty of the civil authorities, finding their civil powers inadequate, to take prompt measures for the use of military force in order to preserve the lives and property for which they are directly responsible.

38. AN INSTANCE OF THE THIRD CLASS arises when the mischief has already commenced and the

WHEN TROOPS SHOULD BE CALLED.

civil authorities, by actual conflict with the mob, have demonstrated their inability to maintain order. It is then incumbent upon such authorities to invoke the aid of the military arm as speedily as possible to avoid further loss, tumult and destruction.

39. AN INSTANCE OF THE FOURTH CLASS arises where the civil authorities have been acting with the mob or, more often, by reason of secret sympathy with the mob have suffered it to proceed without any attempt to restrain it. These instances amount to insurrection or rebellion. It usually becomes the duty of the governor to intervene with a mailed hand and again establish justice and order. If the courts, in the tumultuous district, show weakness, or sympathy with the lawless civil officers, it is sometimes necessary to establish absolute martial law in the district.

40. IMPORTANCE OF PROMPT DECISION. The foregoing classification is made for use in consulting the state laws. It is often of great importance to insure the safety of lives and property by suppressing a riot in its inception. Most state laws permit the use of a military force in a threatened disturbance. Where such permission is given by constitution or statute, a show of force will oftentimes obviate the necessity for using force. Where property is destroyed by a mob, some state statutes require the municipalities to compensate the

WHEN TROOPS SHOULD BE CALLED.

owners for the property so destroyed. The United States Circuit Court of Appeals has recently held, with reference to one of these statutes, as follows:

a. A city may be held liable for the destruction or injury of property, in consequence of a mob or riot therein, where such liability is imposed by statute; and it is no defense to an action for its enforcement that the city exercised all its power to prevent the loss, or that the state and federal governments were also engaged in protecting the property.

b. In an action against a city to recover for property destroyed and injured in consequence of a mob or riot, a proclamation issued by the mayor calling for troops to suppress the riot, telegrams sent by him to the governor, and similar official acts are admissible in evidence to show the conditions existing at the time the property was destroyed.
(17)

41. USE OF FEDERAL MILITIA. The constitution of the United States guarantees to every state a republican form of government, protection against

(17) City of Chicago v. Pennsylvania Co., 119 Fed., 497. See also as to similar statutes: Marshall v City of Buffalo, 68 N. E., 1119, 176 N. Y., 545; Clear Creek Water Works Co., v. Lake County, 45 Cal. 90; La. v. Mayor, etc., 109 U. S. 285, 3 Sup. Ct. Rep., 211; Allegheny Co. v. Gibson, 90 Pa. St., 397, 35 Am. Rep. 670; Bd. of Comr's. etc., v. Church, 62 Ohio St., 718, 78 Am. St. Rep., 718, 57 N. E. 50.

WHEN TROOPS SHOULD BE CALLED.

invasion and against domestic violence. The latter protection is afforded on application of the legislature or of the governor when the legislature cannot be convened. (18)

Under this constitutional provision Congress has stated when the federal government shall interpose in the affairs of any state. Both regular troops and the militia of other states may be used by the president in rendering federal aid to a state.

42. FEDERAL AID. The federal statutes relative to the use of militia in times of riot and insurrection, when state authorities are powerless or in rebellion, are here set forth because of their universal application. They are:

“Whenever insurrection, domestic violence, unlawful combinations, or conspiracies in any State so obstructs or hinders the execution of the laws thereof, and of the United States, as to deprive any portion or class of the people of such State of any of the rights, privileges, or immunities, and the constituted authorities of such State are unable to protect, or, from any cause, fail in or refuse protection of the people in such rights, such facts shall be deemed a denial by such State of the equal protection of the laws to which they are

(18) U. C. Const., Art. 4, Sec. 4.

WHEN TROOPS SHOULD BE CALLED.

entitled under the Constitution of the United States; and in all such cases, or whenever any such insurrection, violence, unlawful combinations or conspiracy, opposes or obstructs the laws of the United States, or the due execution thereof, or impedes or obstructs the due course of justice under the same, it shall be lawful for the President, and it shall be his duty, to take such measures, by the employment of the militia or the land and naval forces of the United States, or of either, or by other means, as he may deem necessary, for the suppression of such insurrection, domestic violence, or combinations." Sec. 5299, U. S. Rev. Stats.

"Whenever, by reason of unlawful obstructions, combinations, or assemblages of persons, or rebellion against the authority of the Government of the United States, it shall become impracticable, in the judgment of the President, to enforce, by the ordinary course of judicial proceedings, the laws of the United States within any State or Territory, it shall be lawful for the President to call forth the militia of any or all the States, and to employ such parts of the land and naval

WHEN TROOPS SHOULD BE CALLED.

forces of the United States as he may deem necessary to enforce the faithful execution of the laws of the United States, or to suppress such rebellion, in whatever State or Territory thereof the laws of the United States may be forcibly opposed, or the execution thereof forcibly obstructed." Sec. 5298, U. S. Rev. Stats.

"In case of an insurrection in any State against the government thereof, it shall be lawful for the President, on application of the legislature of such State, or of the executive, when the legislature can not be convened, to call forth such number of the militia of any other State or States which may be applied for, as he deems sufficient to suppress such insurrection; or, on like application, to employ, for the same purposes, such part of the land or naval forces of the United States as he deems necessary." Sec. 5297, U. S. Rev. Stats.

"Whenever, in the judgment of the President, it becomes necessary to use the military forces under this title, the President shall forthwith, by proclamation, command the insurgents to disperse and retire peaceably to their respective abodes,

WHEN TROOPS SHOULD BE CALLED.

within a limited time." Sec. 5300, U. S. Rev. Stats. (19)

43. APPLICATION FOR FEDERAL AID must be made by the State legislature when it is in session or can be convened. If it cannot be convened, for lack of time or other reason, the governor should apply personally to the president. In such application he must state that the legislature cannot be convened and that the civil and military powers of the state are inadequate for the emergency.

(19) For a history of the exercise of these powers see: "Federal Aid in Domestic Disturbance," W. D. 1903, Senate Document 209, 57th Congress; Birkhimer, Mil. Govt. and Mar. Law.

CHAPTER FOUR.

ASSEMBLY BEFORE RECEIPT OF ORDERS

44. ADVISABILITY. It is sometimes important for guard officers to have their men in their armories, ready for work, when the orders therefor are received. At other times this is impossible. At still other times such assembly is improper. Existing conditions must determine these questions. There are occasions when the sight of guardsmen hurrying to their quarters, in or out of uniform, may have a quieting effect upon a threatened disturbance. There are other occasions when such action causes additional excitement and irritation.

45. REGULATIONS. The regulations of some states prescribe that, when guard officers are advised of an impending disturbance, these officers shall quietly warn their men that a call is imminent or probable and shall proceed quietly to prepare their troops for action in anticipation of an order therefor. In states where such regulations obtain, guard officers should act as directed by the regulations. On failure to do so they may become amenable to a court-martial for their neglect of duty.

46. WHERE NO REGULATIONS EXIST requiring

ASSEMBLY BEFORE ORDERS.

the troops to prepare or assemble before a call for duty, company commanders may use their discretion as to warning the men for duty. If, in their judgment, the assembly of men would occasion greater disorders, by reason of the antagonism that might be excited, a public assembly might tend to precipitate trouble. In such case the assembly should be made secretly and only when a call seems imminent. On the other hand, where the disturbance is not in the vicinity where the troops are stationed, their assembly can rarely do harm in a community where the assembly is made. In this last instance, unless there is danger of precipitating immediate action by the insurgents in the troubled district, news that troops are assembling at a nearby station causes the more cautious men of the mob to hesitate; and he who hesitates is lost to the mob, as a rule.

47. CARE OF PUBLIC PROPERTY. When a tumult near troop quarters is expected, the public property may be considered in danger. This is especially true of the arms and ammunition. The company commander must not wait for orders before taking means to protect this property. If he deems the emergency sufficient he may order a suitable guard to care for the property. This guard is ordinarily treated as a Cossack post. If only three men are used they may relieve one another as sen-

ASSEMBLY BEFORE ORDERS.

tinel, in the usual way, and all may be required to remain under arms. In this case one of the men should be a non-commissioned officer or experienced soldier.

48. CAUTIONARY ORDERS. It often happens that a company, battalion, or regimental commander receives orders to hold his troops in readiness for riot duty. Such an order, if from a lawful source, is an order of the governor and is in many instances tantamount to an order for service, although the men may not subsequently leave their quarters. If such an order is sufficiently specific the company commander should spend his spare time, after assembly, in perfecting the details for the anticipated duty and he must not forget to make out his morning reports, and send same forward, showing the number of men assembled for duty. In such an emergency it is commonly the custom to contract for meals for the men at a nearby restaurant unless the character of the order received indicates that time will be afforded for the establishment of a regular commissariat.

49. CONDUCT OF OFFICERS. The behavior of the officers at all times during riot duty is a matter of great importance. No officer should take a drink no matter how badly he thinks he needs it. The reasons for this will be explained in chapter seven.

ASSEMBLY BEFORE ORDERS.

It is noticeable that officers, no matter how competent and courageous, often get their nerves jangled up during the preparation for active service and betray a nervousness of manner which is readily communicated to the men and is the cause of unnecessary shouting and excitement. It sometimes produces a bad effect upon recruits or the younger members of the organization. This state of nervousness quickly leads to dangerous mistakes. Therefore the officers should constantly maintain calmness of demeanor, should give their orders quietly and without betraying any excitement, should avoid the appearance of hurry, even while doing things quickly and above all should keep at work. They must keep at work because it is the surest way of allaying their own nervousness and is what they are there for. The officer must keep the men employed for the same reasons.

50. CONDUCT OF MEN. While men are awaiting orders or preparing for riot duty they must be kept under rigid supervision and control. Any tendency to nervousness and excitement must be combated by means most available to the commanders. The men must not be allowed to enter saloons or carry intoxicants in their canteens, baggage, or on their persons. Everything they do should be done quietly. If the men are kept constantly employed they will be much more easily controlled and their

ASSEMBLY BEFORE ORDERS.

nervousness will disappear by requiring them to concentrate their attention. Upon assembly for duty some of the younger men sometimes make a display of private weapons. They should not be permitted to handle cheap grades of revolvers about the armory and should be warned against keeping such weapons loaded in quarters. The company commander may use his discretion as to whether or not the men should carry these private weapons. He may permit them in some instances and forbid them in others, or prohibit them altogether, as he sees fit. If time permits he should inspect those which he permits the men to carry.

51. SUBSISTING MEN BEFORE ORDERS RECEIVED. If the company commander apprehends that a call will be forthcoming, and orders his men to assemble to await such call, the question of paying for subsistence arises unless the call be immediately received. Unless the commander's company funds are in shape to stand the strain, and even if they are, the commander may, at this time, use a long distance telephone to advantage and secure the cautionary order mention in section forty-eight. Under such an order he can make contracts in the name of the state and avoid company and individual responsibility for expenditures. The pay of the men could be arranged for in the same way. If the company commander can not secure authority to

ASSEMBLY BEFORE ORDERS.

make contracts for subsistence, he may relieve his men for meals by sections; but should make them understand that they are under orders and must return to quarters or become guilty of violations of military law.

CHAPTER FIVE.

WHO MAY CALL OUT TROOPS.

52. STATE CONSTITUTIONS AND STATUTES. It is again necessary to refer the student to the constitutional and statutory provisions of his own state in order to determine which of the civil authorities are authorized to call out troops. The same provisions which state when troops are to be called out, referred to in section twenty-five, are to be consulted in order to learn who may make the call. In the absence of any constitutional or statutory directions the governor of a state has the right to invoke the aid of the state troops in extreme emergencies. This right necessarily follows the institution of a republican form of government with its triune division of governmental functions: executive, legislative and judicial. The Supreme Court of the United States has held:

“Unquestionably a state may use its military power to put down an armed insurrection too strong to be controlled by the civil authority. Power is essential to the existence of every government, essential to the preservation of order and free insti-

WHO MAY CALL OUT TROOPS.

tutions and is as necessary to the States of this Union as any other government. The State itself must determine the degree of force the crisis demands." (1)

The power to do the things indicated in the above quotation is, in the states of the American Union, almost universally vested in the chief executive. In England, because of the profligacy and irresponsibility of certain monarchs, this power was gradually taken from them and retained by the legislative branch of its government. Our federal constitution has, in some degree, divided the war power between the president and congress. This was done because of the experiences of our English forbears. Notwithstanding this attempted division of the war power by the federal constitution, the legal authority of the president, when ordinary civil methods have failed to control affairs, is much greater than that of the king of England. This is true, even in a higher degree, of the governors of the various states. The only exceptions in the case of the governor are where the constitution of his state gives to the legislative branch of the state the power to act in insurrection and domestic disturbances and where the constitution forbids these powers to the governor.

53. THE PRESIDENT OF THE UNITED STATES,

(1) Luther v. Borden, 7 How., 45-6.

WHO MAY CALL OUT TROOPS.

under the federal constitution and laws, may, and often has, taken a hand in restoring order in a state even when not directly called upon to do so. In such case he may use the regular army and the militia of other states. (2)

54. THE GOVERNOR is almost invariably clothed with constitutional and statutory powers relative to the use of state forces, he being the highest civil authority in the executive department of the state. (3) He should be at once informed of any disturbance, within the state, which will probably be of a serious character and may get beyond the control of the civil authorities of the city or county. By communicating with the governor when serious disorders are apprehended, civil authorities give the military department of the state an opportunity to act effectively in preventing disturbances. These civil authorities also place a part of the responsibility for subsequent destruction of lives and property, if any, upon the chief executive. But this is only so when they have conscientiously and diligently used their civil powers to the utmost in attempting thereby to preserve the peace.

55. OTHER CIVIL AUTHORITIES. The laws of many states provide that certain civil authorities may call the militia to their aid in quelling a dis-

(2) See Sec. 42 and note.

(3) See cases cited under Sec. 55.

WHO MAY CALL OUT TROOPS.

turbance. These statutes usually provide that a sheriff, a mayor, or a judge of a certain court may issue his call to the commanding officer of any regiment, or other unit, to report his troops at a certain place to aid the civil authorities. An officer called under such a statutory provision should at once report, by telephone or telegram, to the governor, giving the substance of the call. He thereafter obeys the civil authorities in their general directions except in cases where the governor issues conflicting instructions. In such cases the orders of the governor are supreme and the officer may safely disregard orders conflicting therewith. This is because the governor is the highest civil authority in the state and is the chief of the executive branch of the government. To permit the orders of a judge to control troops, as against definite orders of the governor, would be permitting the judicial branch of the government to usurp the functions of the executive branch of the same government. (4)

56. JURISDICTION OF MINOR CIVIL AUTHORITIES. The statutes referred to in the preceding

(4) Appeal of Hartranft et al., 85 Pa. St. 433; State ex rel v. Warmouth, Governor, et al., 22 La. Ann. Rep. 1; Mauran, Adj't. Gen'l. v. Smith, Governor, 8 R. I. Rep., 192; The People ex rel v. Bissell, Governor, 19 Ills., 229; State ex rel v. Towns, Governor, 8 Ga., 360; Hawkins v. Governor, 1 Ark., 570; Mott et al. v. Penna. Co. et al., 6 Casey, 33.

WHO MAY CALL OUT TROOPS.

sections are sometimes so drawn that the mayor of a city, in reading these provisions, conceives that he has the right to order any and all state troops to his aid. These statutory provisions also indicate that the sheriff of a county has the same right. But this construction is erroneous. (5) The mayor of a city may address his call to only such troops as are stationed within the city. The sheriff of a county may address his call only to such troops as are stationed within the county. The judge of a district may only call out troops within his district. No one but the governor, or the legislature in specified cases, may issue a general call. If this were not true a regimental commander might receive imperative orders to hasten his forces to a hundred different places at the same time.

In cases where civil authorities require the aid of troops, and no troops are stationed within their district, county or city; such civil authorities must appeal to the governor directly. This appeal should be a telegram in order that a record may be preserved of it. It should state sufficient facts to enable the governor to determine the advisability of sending troops.

57. **APPEAL TO GOVERNOR.** Where civil authorities are authorized by law to call out troops, it is nearly always advisable for such authorities to re-

(5) So held by Governor Nash, of Ohio, an able lawyer; and by his attorney general.

WHO MAY CALL OUT TROOPS.

quest the governor to issue the order. Such a course avoids subsequent embarrassment as to subsistence of troops, pay of troops and many other matters. This course is best because it gives the governor and the other civil authorities a common responsibility and avoids unnecessary friction. For instance: A mayor orders out a battalion of militia in his city and the commanding officer reports to the governor. If this is the first intimation that the governor has that a call has been made, he requires information from the mayor. A misunderstanding occasionally arises because the mayor may at first assume the position that his orders are of equal force with those of the governor. The mayor may not realize that both military law and civil law require the commanding officer to implicitly obey the orders of the governor. No commanding officer can successfully serve two masters unless these masters are in harmony and act together.

58. **CONFLICTING ORDERS FOR SERVICE.** In 1904 the Kentucky court of appeals decided that, where militia were called out by the legal governor and, while on duty, received conflicting orders (from the followers of two aspirants for gubernatorial honors) to disband and also to remain on duty: the militia might remain on duty until the commanding officer received an order on which he could

WHO MAY CALL OUT TROOPS.

rely. (6) This sounds like a case for federal intervention; but the matter was adjusted *inter sese* after the murder of one of the rivals. In this instance the militia officers were placed in a delicate position. They were afraid of being charged with desertion if they obeyed the order to disband; but they so conducted matters as to maintain the good will of all law-abiding citizens.

(6) Sweeney v. Commonwealth, 82 S. W., 639, 26 Ky. Law Rep., 877.

CHAPTER SIX.

ORDERS AND REPORTS.

59. **WRITTEN ORDERS.** Orders relative to riot duty should always be in writing. If a commanding officer of troops receives a verbal or telephone order from a civil officer ordering troops on duty, he should request that it be put in writing at once.

(1) The commanding officer may act upon the verbal order until the written order is received, but he should not fail to secure it as soon as possible. Such commanding officer should endorse on the written order the exact time of its receipt by him, for future reference. Other and succeeding orders should be treated in the same way.

60. **AN ORDER FOR TROOPS** is properly addressed to the commanding officer of the troops required. This order varies in form according to the circumstances.

1. If the occasion comes within the first class mentioned in section thirty-five the order would probably require the commanding officer to assemble his troops and await further orders. Thereafter a

(1) "When a statute directs notice to be given the rule is that it is to be given in writing, in which respect it differs from the common law." *Court in Church v. Co. of Phila.*, 4 Pa. Law J., 184 (153).

ORDERS AND REPORTS.

succeeding order from the governor, through his adjutant general, might be received requiring the troops to be moved to a certain point and specifically pointing out services to be there rendered.

2. If the occasion comes within the second class mentioned in section thirty-five, the order by the proper civil authority would be directed to the commanding officer of the troops required, commanding him to assemble his troops and report to a certain civil officer at a certain place, either forthwith or at a certain time, in aid of the civil authorities.

3. In occasions of the third class, mentioned in section thirty-five, the order would be practically the same as that for the second class.

4. In occasions of the fourth class, mentioned in section thirty-five, the order would come, in almost every instance, from the governor and would direct the commanding officer, of the troops required, to assemble such troops, proceed to the scene of disturbance and establish whatever degree of martial law was necessary to restore civil government. (2) In this class of cases many succeeding orders would naturally be received by commanding officers. These should not be telephoned except where no other means of rapid communication were at hand. When telephoned they should

(2) See full text of an order by the governor of Pennsylvania, at Sec. 211.

ORDERS AND REPORTS.

be taken down in writing and read back to the superior. One small pocketbook containing the commanding officer's orders should be his most important possession at this time. The best form for such book is the ordinary telegraph blank book, with alternate ruled and blank pages, and a sheet of carbon paper.

61. **FORM OF ORDER FOR TROOPS.** Orders from general headquarters of a state, if issued by the adjutant general, should bear the statement, "By command of Governor ————." It has been held that an order issued "By direction of the Secretary of War" cannot be regarded as the order of the president. (3) Therefore an order by direction of the adjutant general might not afterwards be held to be the order of the governor. An interesting form of order, which applies to the second and third classes mentioned in the preceding section, is set out in full in an old Massachusetts statute which specifies who may call out troops in certain emergencies; it provides that such call, if issued by a court, shall be in substance as follows:

"....., SS.

COMMONWEALTH OF MASSACHUSETTS

L. S. To A. B.
(Insert the officer's title)

Commanding
(Insert his command)

(3) Truitt v. U. S., 38 Ct. Cl., 398.

ORDERS AND REPORTS.

Whereas, it has been made to appear to our justices of our, now holden at
....., within and for the county of,
that

(here insert description of tumult in such terms as to show that
officer signing hereunder has legal right to call for troops)

in our county of
....., and that military force is necessary to
aid the civil authority in suppressing the same:
now, therefore, we command you that you cause,

.....
(here state the number and kind of troops required)
armed, equipped and with ammunition, as the law
directs, and with proper officers, either attached to
the troops or detailed by you, to parade at
....., on, then and there to
obey such orders as may be given them, according
to law. Hereof fail not, at your peril, and have you
there this writ with your doings returned thereon.

Witness,L. S., Esquire, at,
on the day of, in the year.....

C. D. CLERK."

While this form is unnecessarily long, it is here
inserted as a guide which may be varied to suit the
circumstances. It has one defect i. e., it does not
specify *to whom* the commanding officer shall re-
port. Under many statutes this order by a civil au-
thority could read as follows:

ORDERS AND REPORTS.

"To Colonel C. S. Ammel,
Commanding 4th Infantry,
Ohio National Guard.

Sir:—A mob has assembled at Jones' Garden, South High street and city line. It threatens to destroy Alaska Steel Company's plant and has defeated my posse. Assemble Companies A, B, C, and I, 4th Infantry, O. N. G., and report forthwith to me at County Jail.

GEORGE KARB,
Sheriff of Franklin County, Ohio.
Columbus, Ohio, January 30, 1906. 11 P. M."

62. ACKNOWLEDGING RECEIPT OF ORDERS. One of the first things the commanding officer must do, after receiving his call for duty, is to report receipt of the order and designate exactly where he can be found from that time until he shall again report. This is very important because the governor or other civil authority calling out troops, if in ignorance as to the fate of his order, is absolutely at sea as to further procedure. If the order for troops has not come from the governor the officer should forward its substance to the governor at once, as previously mentioned. (4) Receipt of all subsequent orders should also be acknowledged when their importance is such as to indicate that any anxiety may be felt by the officer's superior.

(4) See Sec. 55.

ORDERS AND REPORTS.

63. THE FIRST ORDERS OF THE COMMANDING OFFICER, so called upon to assemble his troops, should issue at once to his subordinates. The time of issuance of these orders should be noted in the officer's pocketbook. If these orders are issued by a company commander their execution is of course seen to personally. If issued by a regimental commander he must require reports as to how the troops are assembling and when they will be ready for the services required. In this last case the company commander should keep in constant touch with the headquarters office. Orders among officers of a national guard organization, when called into service, should be sufficiently definite to enable the interested officers to recall their character and the time when given. If every commanding officer makes a memorandum in his pocketbook of the issue, substance and receipt of each order, difficulty may be avoided. The information thus noted is necessary in making up reports of the tour of duty.

64. COMMUNICATION WITH THE GOVERNOR should be kept constantly open by the commanding officer of troops on riot duty. Frequent reports should be made to the governor as to the progress of the troops in quelling the disturbance. The commanding officer must remember that the governor is probably waiting at his office, in great distress of mind and anxiety relative to the situation. He

ORDERS AND REPORTS.

should also remember that time drags very slowly to the governor under such conditions and that five minutes of anxious waiting may often seem like an hour to him.

65. **SUBSEQUENT ORDERS FROM CIVIL AUTHORITIES.** When troops are acting in aid of civil authorities the commanding officer may require all orders from such civil authorities to be in writing whenever possible. Another matter of importance is to secure the actual attendance of the county sheriff, mayor, or other proper civil authorities while quelling the disturbance. For instance: the troops are acting under the general order of the sheriff. It becomes necessary, for the first time, to order the troops to fire and precipitate a general conflict. At such a moment it is of the utmost importance to have the sheriff by the elbow. Require him to give the order. Then give the command to fire. If the sheriff is absent when such a command is given, (still assuming that troops are acting in aid of the civil authorities) he might disavow any responsibility for the ensuing loss of life and place the commanding officer in jeopardy.

66. **ORDERS AND REPORTS IN GENERAL.** When the mob has been dispersed and property is being guarded, special orders to sentries may be issued in the form of standing orders. Where it is advisable to make these orders public they may be given

ORDERS AND REPORTS.

publicity in any convenient way. Many of these orders necessarily affect the citizens and in such cases they should be made acquainted with the character of the orders.

Civil officers at the scene of disturbance will of course be advised as to the time of arrival of troops sent to their aid. Meanwhile such civil officers may be required to report, to the commanding officer, the progress of the disturbance and any changes in its character. Details of this subject are mentioned in section eighty.

Orders relating exclusively to the troops should not be embodied in orders which relate to the conduct of citizens. Remember that the former are under military law, the latter under civil law or martial law.

67. **CONFLICTING ORDERS.** In case of a conflict of orders, the commanding officer of troops ordered on riot duty should refer the matter to the governor of his state. If the governor decides the question, the officer should consider the decision final and act in accordance with it. (5) With reference to this question, the Supreme Court of Pennsylvania has said:

(5) Whenever, in this volume, the statement is made that the governor has supreme powers, it is assumed that the situation is one where state troops are acting in the service of their own state.

"It follows, if the governor, as supreme executive, and as commander-in-chief of the army of the commonwealth, is charged with the duty of suppressing domestic insurrections, he must be the judge of the necessity requiring the exercise of the powers with which he is clothed, and his subordinates, who are employed to render these powers efficient; and to produce the legitimate results of their exercise, can be accountable to none but him." (6)

68. PROTECTION AFFORDED BY ORDERS. A soldier is bound to obey the orders of his superior officer where such orders do not clearly show their own illegality, and such orders will be a protection to the soldier. (7)

69. INTERPRETATION OF ORDERS. A footnote to a rule or regulation is not less authoritative than the principal text, where the language of the footnote and the general character of the principal text point to a single authorship, and an intention that the footnote shall command respect and obedience in like manner as the body of the rule or regulation. (8)

(6) Appeal of Hartranft et al., 85 Pa. St., 433, 444-5.

(7) Commonwealth v. Shortall, 55 A. 952, 206 Pa., 165. And see Sec. 67.

(8) In re Brodie, 128 F. 665, 63 C. C. A., 419; In re Coffey Id., In re Henshaw, Id.; In re Morris, Id.

ORDERS AND REPORTS.

70. MINORS. A father has no power to exonerate or withhold his son, over 18 and within 21 years of age, from the performance of militia duty.
(9)

(9) Stevens v. Foss, 18 Me. (6 Shep.), 19.

CHAPTER SEVEN.

CONDUCT OF OFFICERS.

71. **IN PREPARATION.** The conduct of officers in preparation for riot duty has been referred to in section forty-nine. It may be further said that, in communication and conference with the civil authorities, it is essential for officers to preserve good humor and cheeriness of demeanor. Civil officers, anticipating trouble, nearly always ask for advice of the guard officers. Such advice must be given guardedly. Whenever a guard officer is reasonably certain on any proposition he may frankly give his opinion. If he is uncertain he should, just as frankly, say that he don't know. Otherwise the civil officer may be misled and a haphazard opinion may lead to a serious mistake. If the mayor of a city inquires about his legal authority to take certain measures he should be referred to his city solicitor unless the guard officer is reasonably certain of the proper answer.

72. **THE DECISION OF LEGAL QUESTIONS,** by both military and civil officers should be deliberate. Conclusions should not be jumped at hurriedly. Law is not a mathematical science. Legal decisions are

CONDUCT OF OFFICERS.

reached by the application of legal principles, in a logical way, to varying sets of facts. Invariably, the application which a court has made, to a certain set of facts, of the principles of law governing such facts, results in a decision which has been rendered deliberately. This decision establishes a rule for future conduct. But this rule can be safely followed only under circumstances where the facts and the law are similar. It is often the case, when a civil and military officer are discussing the advisability of calling troops, that neither they nor their nearest advisers are familiar with the legal questions presented. In such an emergency the city solicitor or county prosecutor could be called in and the constitution of the state, with those few sections of the statutes which relate to riot duty, should be consulted. If the guard officer has made any preparatory study for the duty he can furnish complete references to these constitutional and statutory provisions and no time will be lost in finding them. To these few paragraphs of written law, the officer could add any regulations or authorities he has upon the subject and a proper start may be made.

73. **LIABILITY OF MUNICIPALITY.** There are, as set forth in section forty, many states where statutes require the municipality to pay for property destroyed by mobs. An officer in such state, in discussing a call for troops with a civil officer, would

CONDUCT OF OFFICERS.

do well to call the attention of the civil officer to such statute in order to apprise him of a responsibility of which he may be ignorant. No such liability exists except under a statute.

74. CONDUCT TOWARD CIVIL OFFICERS. All officers on riot duty, will consult their own comfort and interests best by uniform consideration for all civil officers who are attempting to properly discharge their duties. In this connection matters of some delicacy frequently arise because civil officers, with an eye to maintaining the support of all factions of the community in future political contests, are prone to play politics. As long as they do so without interference with the proper discharge of their official duties and refrain from interference with the official duties of other civil and military officers; the civil and military officers may jointly operate in bringing the tumult to a successful conclusion. But if the military officer permits a politician to override his judgment, as to what is right in dealing with a mob, he at once gets onto thin ice that may not carry him over the danger spots. Notwithstanding disputes that may arise, the officer must not forget the sixty-first Article of War.

75. CONDUCT TOWARD TROOPS. Troops on riot duty are subjected to many necessary hardships. They usually spend all of the first night in traveling, fighting or guard duty. Quarters for the second

CONDUCT OF OFFICERS.

night are not usually comfortable. The work is exhausting under favorable conditions, but the strain is not noticed for the first forty-eight hours. After that the men begin to complain of unnecessary hardships. If, in the inception of a disturbance, the staff departments of the regiment and companies get to work energetically and intelligently they can do a great deal toward alleviating the discomforts of their comrades. If the commissary, cooks and assistants and the quartermaster and his staff are started out in their respective duties as soon as possible, time is gained in the end for the whole force. A machine can not continue to do thorough work while some of its parts are out of adjustment. Rigid discipline will, necessarily, be constantly enforced.

76. CONDUCT TOWARD CITIZENS, by all soldiers engaged in riot duty, should be uniformly courteous except where a citizen shows a tendency toward affiliating with the mob. In almost every disturbed district there are citizens who will heartily co-operate with the troops in preserving the peace. These citizens are friends. If properly treated, they will give valuable information to officers and men and will aid the troops in many ways. Their sentiments will gain favor with citizens who are wavering toward the insurrection. If the latter are properly encouraged public sentiment itself will soon make for the restoration of order.

CONDUCT OF OFFICERS.

Private property must be invariably respected and protected where necessary and possible.

77. CONDUCT TOWARD THE MOB varies greatly with the character of the tumult. It may be necessary to act with extreme firmness and, in some cases, harshness. If an insurrection comprises the entire community it is necessary to resort to some of the individual members to aid in obtaining information. Under such circumstances it may be assumed that the persons inquired of will lie. Under these conditions the following plan has been used with considerable success. Catch four or five of the apparent leaders of the mob and separate and isolate these men by confining them in non-communicating cells of the city prison or county jail. Make out a list of questions covering the information wanted, one question to a page. Bring out each man separately and get his answers to these questions without his having had any chance to communicate with the other captives. It is wonderful what a difference there will be in the answers. Each man knows the truth, but each man tells a different lie in order to conceal it. Then proceed to administer punishment for the lies told. Confront each man with the indisputable evidence of his falsehoods. Then ask the same questions over again. The answers will again vary, but some of the men will have weakened and told the truth in some instances. Some of the an-

CONDUCT OF OFFICERS.

swers to the various questions will be found to corroborate others and thus the true answer may be deduced. If not proceed as before. Punishment and re-examination and the truth will eventually come out. During this procedure the captives should not be given the slightest chance to communicate with one another.

78. **QUALIFIED MARTIAL LAW.** It has been well said by some of the best courts of this country that the moment troops in the field are ordered by the governor to perform any service independently of civil authorities, or to control civil affairs, a state of at least qualified martial law exists. Military and civil officers, when troops are so acting, should amicably agree as to what degree of martial law is to be exercised. In case of a dispute, consult the governor. This subject is discussed in chapter seventeen.

79. **PERSONAL CONDUCT.** As heretofore stated no officer, on duty during riot, especially during the first stage, should either take a drink, or enter a saloon. The weather may be such as to render a stimulant beneficial, the exhausted condition of the officer may demand a quick recuperative, but the consequences of taking: "One little drink" or even entering a saloon have been, under such circumstances, extremely grave. Once upon a time a colonel of the national guard walked quietly into a sa-

CONDUCT OF OFFICERS.

loon and took a drink. He really needed it as he had been on his feet for practically twenty-four hours. Unfortunately, within two hours, a mob charged the court house which was being guarded by this officer's regiment. After repeated warnings, he gave the command to fire, and several of the mob were killed and wounded. This commanding officer was afterwards indicted by the grand jury which next sat in that court house, for manslaughter. The defendant, thus indicted, was compelled to employ the best legal talent available, secure a change of venue to an adjoining county and sit six weeks as defendant in the trial of a murder case. During the production of the testimony it developed that the friends of those who had been killed and wounded in the court house fight had persistently circulated the story that the officer who gave the command to fire was drunk at the time. The defense of this case was so expensive as to nearly ruin the officer in spite of the fact that the state afterwards reimbursed him in the sum of about twenty-five hundred dollars. Meanwhile, damage suits with claims aggregating seventy or eighty thousand dollars were prepared by the friends of those killed and injured in the riot. In all of these suits the same commanding officer would have been defendant had he not gone to considerable trouble to escape service and otherwise avoid having the cases tried in the county

CONDUCT OF OFFICERS.

where the troops had operated. Thus the fact that this officer was seen to publicly take one drink in a saloon was seized upon by a score or more of malicious persons and, as the story was bruted about, the one drink increased in number like the three black cats. An infinite amount of trouble was caused an unfortunate commander who had, in fact, conducted himself throughout the riot with perfect propriety and bravery. This is not a fable. The story is true in every detail.

CHAPTER EIGHT.

MOVEMENT OF TROOPS.

80. SCOUTS. The commanding officer moving troops to the scene of a riot ought to know in advance just what conditions he will encounter. In order to obtain this information he may detail trustworthy enlisted men to proceed to the scene of disturbance in advance of the troops. These men go, almost invariably, in civilian dress. After their first report it is sometimes advisable to continue to employ them in civilian dress. Certain citizens may also be permitted to affiliate with the mob. To reduce the risk they must have secret means of communication with the commanding officer. There are many ways of quietly securing information, which may be devised by a little study; but it is not advisable to publish them. By using these means proof may be secured against certain turbulent men which can afterwards be used to advantage by the proper authorities.

81. CIVIL AUTHORITIES SHOULD MEET TROOPS. In cases where troops are called to their aid, the civil officer who is to have the general direction of the troops should, by preconcerted arrangement,

MOVEMENT OF TROOPS.

meet them at some point near the disturbance. This meeting point should possess some tactical advantage. It ought to be near enough to the disturbance to enable the troops to act promptly. It should not be so close to a mob that a conflict might occur before the civil officer and the military officer have time to concert a plan of action. It is advantageous to come upon the mob with troops fully prepared for all ordinary emergencies and these preparations cannot safely be made in full view of the mob.

82. DETRAINING, in the immediate presence of a mob has, on some occasions in the past, resulted in the complete dispersal of the militia. On one occasion in Ohio, a disturbance in a mining district occasioned a call for troops. The disturbance was in a small mining town, located in a narrow valley in the midst of which stood the railway station. Shortly after the call a train drew up at this station with one company of infantry on board. The train was surrounded by the mob. The men began to emerge one by one from the passenger coaches. They were received and disarmed one by one by the mob. Some of them were told to go home. Others were more roughly treated. It is unnecessary to state the moral effect that this victory had on the mob.

Unless a commanding officer wishes to run the risk of a similar experience, he must, when neces-

MOVEMENT OF TROOPS.

sary, take command of the train upon which his troops are transported. This train is in state service and the military officer may give any necessary orders to the railway crew; but the commanding officer must give these orders at the proper time. He must remember that trains are controlled by block signals and train dispatchers and he must not so interfere with the running of the train as to endanger the lives of his men or of railway employees or passengers on other trains.

83. DISCIPLINE ENROUTE. As the officers and men are on a delicate mission, their conduct, enroute to the scene of disturbance, will have a material effect upon the public sentiment for or against them. It is to be hoped that the old days of robbing pie counters are over without exception. In the mind of the old time militiaman there may have been some idea of justice in taking refreshments or necessities without paying therefor. He was sent out upon a public duty often without any chance of pay for many months to come, frequently without a cent in his pocket and commonly without any staff officer to furnish to him the necessary subsistence. Under such conditions the militiaman often gained public condemnation by what seemed to him a necessary foraging trip. The militiaman was wrong, in fact he was a thief, but the government who placed him

MOVEMENT OF TROOPS.

in such a predicament was equally censurable from a moral point of view.

Such acts of vandalism must never be permitted. If certain men of any regiment take or destroy property unlawfully, the names of the offenders should be immediately ascertained and these men required to make full reparation. This can be done by assigning their pay accounts to the injured persons and having the company commander accept the order.

Some instances may arise where property is taken, injured or destroyed by members of a certain company and the names of these men cannot be ascertained because neither men nor officers of the organization use proper means to secure their divulgence. In such a case the commanding officer will deduct from the pay of the entire organization a sum sufficient to defray the damages these men have occasioned, to the persons injured. Such action by the commanding officer is in the interest of justice, tends to promote respect for the national guard and is fully authorized by the fifty-fourth Article of War. Furthermore, men who have been required to make such payments have received very healthful lessons which will promote a better state of discipline in the future.

84. MARCHES are often required to reach the point of disturbance. These marches may be made

MOVEMENT OF TROOPS.

through what could hardly be classed as enemy country; but nevertheless through country where the inhabitants may be secretly hostile. Under such circumstances it may be assumed that news of the character and strength of the command is preceding it. As it is important that this news should create the impression desired by the commanding officer, he has certain means at his disposal to effect this end. He is justified in sending forth false information, where necessary, and in concealing the strength of his command; misrepresenting the line of march and also the time of the march.

85. TRANSPORTATION will be suited more to the emergency of the occasion than to the comfort of the troops. The commanding officers, personally or through members of their staffs, will make their contracts or seize the necessary transportation according to the need for haste. A freight engine and gravel train has heretofore been used when better rolling stock could not be obtained. Before seizing transportation, when it seems necessary to do so, the officer ought to be assured of the gravity of the situation and the urgency of the occasion. An order from the governor should be secured except in extremely rare instances.

The best available means of transportation is that which fills the speed requirement. For distances under thirty miles, interurban cars are successfully

MOVEMENT OF TROOPS.

used for small bodies of infantry. When transporting machine guns, the crews should not be separated from the guns except on long journeys. The same recommendation may be made as to artillery.

86. SEPARATE UNITS. It is assumed that the commanding officer is thoroughly familiar with the transportation facilities of his various stations and that he will not use one means where another is speedier. A regimental commander, receiving orders to proceed with his regiment to a certain point, may send certain companies in advance under proper conditions. For instance: a colonel has twelve companies stationed in twelve villages. A disturbance occurs ten miles from the station of Company E. If the mayor at the disturbed district can use one company effectively, it may be ordered to report to the mayor near the scene of disturbance, without waiting for the mobilization of the entire regiment; but if two companies can be sent as readily as one such course should be adopted. In ordering troops forward in this way there is sometimes danger of precipitating a conflict and this danger, if apparent, ought to be avoided. It must also be borne in mind that the first troops to reach the scene of disturbance should be in command of an officer of experience. Under some circumstances a field officer may be detailed.

MOVEMENT OF TROOPS.

87. TRAVEL RATIONS will be prepared if the commissary department has the necessary time at its disposal. Even where the distance to the post of duty is short the travel ration will be appreciated by the men. In the hurry of preparation they usually neglect to eat. During a railway journey the men want rest and the food which they may not be able to get for some time after arrival at the scene of trouble. If the cooks carry their large coffee cans some embarrassment may be avoided by wiring to certain stations to have a certain number of gallons of hot coffee ready on arrival. It will then be taken on board in company utensils without any delay. Remember that fighting on an empty stomach is bad for the nerves.

88. BAGGAGE. Some militia organizations go into camp with packing boxes that are utterly beyond reason both as to size and weight. The U. S. Manual for Quartermasters Department (1904) provides that packing boxes should be of dimensions as follows:

1. For escort wagon transportation, 38 inches by 19 inches by 15 inches (outside measurements).
2. For escort wagon and pack transportation, 30 inches by 19 inches by 15 inches (outside measurements). That these boxes should be constructed of one-inch pine lumber, dressed on one side and to be bound properly with hoop iron. That sacking

MOVEMENT OF TROOPS.

or baling should be substituted wherever practicable. That all supplies intended for field service, when practicable, should be packed in boxes of the dimensions given above; weight not to exceed 150 pounds gross.

The reasons for these regulations are too obvious to require recital.

89. U. S. SERVICE. When called out by the president, militia will usually have time to mobilize by regiments and complete camp equipage will probably be carried. The U. S. Quartermaster's Manual and U. S. Manual for the Subsistence Department will furnish the rules for the regimental staff officers. Blank forms for securing subsistence and transportation may be procured, in advance, by correspondence with the staff officers of the U. S. military department in which the troops are stationed. This correspondence, under the usual rules, would go through the office of the state adjutant general.

CHAPTER NINE.

AID OF CIVIL AUTHORITIES.

90. **LIABILITY TO ARREST WHILE PERFORMING MILITARY SERVICE.** During the time troops are in service, suppressing a tumult, riot, or insurrection, officers and enlisted men cannot be arrested or compelled to answer process of the civil courts because of any act done on such service. This immunity extends to the officers and men on such service so long as it is necessary for the military to remain in the field for the purpose of enforcing the constitution and laws. During the time of the service, the members of the military organization cannot be called to account by the civil authorities. If they could be compelled to answer to the courts after they had been in the field ten days, or thirty days, they might be compelled to appear in the courts on the first day. Such requirement is absolutely inconsistent with the performance of military duty in active service.

91. **EXCEPTION TO FOREGOING RULE.** An exception to the foregoing rule may arise under conditions indicated hereafter in section two hundred and twenty. It will be there shown that where a

AID OF CIVIL AUTHORITIES.

leader of a riot or mob, or a member thereof, is held by military authorities and a writ of habeas corpus has been sued out, whereby a court requires the military officer to produce the body of such captive; it is the duty of such officer to answer to the writ and state the facts that caused the confinement, and to produce the prisoner, so that the court may make proper orders in the matter.

The writ of habeas corpus is not suspended while troops are acting under general orders of the minor civil authorities.

92. ANOTHER EXCEPTION. The fifty-ninth Article of War provides that when any officer or soldier is accused of a capital crime, or of any offense against the person and property of any citizen in the United States, which is punishable by the laws of the land, the commanding officer of the organization to which the person so accused belongs, is required, excepting in time of war, upon application by or in behalf of the party injured, to deliver the accused to the civil magistrates for trial. This United States statutory provision, in states where the articles of war are held to apply to the militia in state service, must be followed except in time of war. A state of war does not exist while troops are acting strictly in aid of civil authorities. Therefore, when an officer's command is so acting and a member of the command, acting wholly outside the

AID OF CIVIL AUTHORITIES.

scope of his military duties, commits an offense mentioned in the above article of war, he may be turned over to the civil authorities for confinement and trial. In such case the succeeding morning report of the offender's company will indicate that he is in the hands of the civil authorities accused of a certain offense. But the commanding officer must not turn the man over to the civil authorities until, after proper application received, he has made a full investigation of the matter and is convinced that the application is made in good faith and in the interests of law and justice. The commanding officer may require such an application to be sworn to and to be full and explicit. The application, or accompanying evidence, must identify the accused to the satisfaction of the officer receiving the application. (1)

93. WHEN ACCOUNTABILITY TO CIVIL AUTHORITIES BEGINS. After conclusion of the tour of duty, however, officers and men may be compelled to account to the courts for their actions. This accounting is limited to an inquiry into acts in which the troops appear to have exceeded their authority. If the inquiry demonstrates that the action was taken in pursuance of constitutional authority and that the act or acts were not malicious-

(1) Dig. Opin. J. A. G., par. 95.

AID OF CIVIL AUTHORITIES.

ly or unreasonably done, the action is shown to have been justified.

94. **AUTHORITY OF MILITARY OFFICERS.** The enforcement of law by the military arm of the government is necessarily arbitrary and harsh, but it is the only means when civil authorities have failed. When civil authorities have called out the military, and the military are acting in their aid, neither civil nor military officers can create new offenses, or new penalties for old offenses. The lawlessness required to be suppressed is the violation of existing statutes. Therefore it is the duty of the civil authorities, from the governor down, to direct the military officers by pointing out in general terms what duties the military arm shall perform. And so long as the military act in aid of the civil authorities, the military arm is, for practical purposes, acting as an armed police. It is the duty which the police is unable to perform, but would have performed, if able to do so. The details of this power, and its limitations, will be indicated in the succeeding sections.

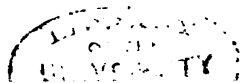
There is a dearth of judicial decisions on the question as to how far the civil authorities control a military officer while the military is acting in the aid of civil power. The reason for this paucity of judicial precedents is complimentary to both civil and military officers. The scarcity of court opinions

AID OF CIVIL AUTHORITIES.

on the point shows that comparatively few conflicts of authority have occurred. It indicates that the civil authorities have, as a rule, appreciated the aid they receive from the military and the relations between the two powers have continued to be friendly, throughout and succeeding governmental troubles. From the few existing decisions it is difficult to formulate detailed rules as to how far a military officer may go in suppressing a tumult while the civil authorities are nominally in control and have sought, not the intervention of the military power, but the aid of the military power. In determining the full scope of a militiaman's duties and authority under this situation, recourse must be had to general rules of law and to the constitutional rights of the civil officers themselves; namely, the right of self-defense, the right that a civil officer has to take life under certain circumstances and to make arrests without warrants from a magistrate.

95. ACT UNDER ORDER OF CIVIL AUTHORITY. But the military must not exercise the powers of policemen, or of a sheriff's posse, without orders from the civil authorities. In a *nisi prius* court, where this point was raised, it was decided that:

“Military authorities cannot exercise the functions of civil power, nor supersede or take its place. As an independent force, such authorities cannot undertake



AID OF CIVIL AUTHORITIES.

to execute or enforce observance of civil laws, nor can they undertake preservation of public peace, the dispersion of unlawful assemblies or the prevention of riots, except under the orders of the civil authorities, and in aid thereof."

"Military officers called to aid authorities have no power to act independently of civil authority, or to usurp its functions or take its place. They are to act simply as armed police, subject to the absolute and exclusive control of magistrates and other civil authorities." (2)

96. SELF-DEFENSE. Homicide is justifiable on the ground of self-defense, where the slayer, in the careful and proper use of his faculties, bona fide believes, *and has reasonable ground to believe*, that he is in imminent danger of death or great bodily harm, and that his only means of escape from such danger will be by taking the life of his assailant, although in *fact* he is mistaken as to the existence or imminence of the danger. (3)

On the trial of one charged with homicide, where the defense is that the killing was done in resisting an attack from a mob, the cries of the mob from the time it formed, though made before the deceased

(2) State v. Coit, 8 Ohio Dec., 62.

(3) Marts v. State, 26 O. S., 162.

joined it, are competent evidence to prove its spirit and purposes, and as reflecting upon its attitude at the time the alleged attack was made. (4)

The two rules just recited were laid down by the Supreme Court of Ohio in cases where private citizens were on trial. They would doubtless have greater force if the accused was a militiaman who was, at the time of taking life, acting in the line of duty, even where his orders did not protect him. These principles would apply to a body of troops as well as to an individual.

97. MINISTERIAL DUTIES. Military officers aiding civil authorities perform ministerial duties only. The sheriff, mayor, or governor who calls out the troops, performs a judicial duty in doing so. This judicial power is conferred upon these civil officers by the state constitution and statutes. As soon as one or more of these civil officers have determined the necessity for calling troops, then their ministerial duties under such call require them to direct the troops. Their judicial powers are *functus officii*. Officers below the governor have no discretion as to means that may be pursued, but after the troops are in the field the civil authorities are guided by the same general rules of law under which they directed their civil forces. The military officers are, under these circumstances, ministerial officers also,

(4) Goins v. The State, 46 O. St., 457.

and their duties then require them to enforce the laws under the direction of the civil officers. Both military and civil officers are bound to use only such force as is reasonably necessary and proper under the circumstances to execute the duty in hand. (5) In other words, while acting strictly in aid of civil authorities, the military officers have only the same powers that these civil authorities have, and they only have these powers when the civil officer directs their exercise by the military.

98. FELONIES AND MISDEMEANORS. In determining the duties of civil authorities, in making arrests, it is often necessary to know whether a certain act is a felony or misdemeanor. On this question, under the common law from which ours is derived, depended, in olden times, either a defendant's life or lands. For the word felony then meant either a capital crime or an act by which a vassal lost or forfeited his fee. (6) As a general rule, all crimes not amounting to felonies are still called

(5) *State v. Coit*, 8 Ohio Dec., 62-65; *Com. v. Shortall*, 206 Pa. St., 165.

(6) 12 Cyc., 132. 4 Bl. Comm., 94 et seq. And see *Bouvier L. Dict.*; *Burrill L. Dict.*; *Coke Litt.*, 391; 1 *Hawkins P. C. C.*, 37; 1 *Russell Crimes*, 42; *Adams v. Barrett*, 5 Ga., 404; *Com. v. Schall*, 12 Pa. Co. Ct., 554; *State v. Murphy*, 17 R. I., 698, 24 Atl. 473, 16 L. R. A., 550.

misdemeanors. (7) It is recorded that at one time seventy-two felonies were punishable by the death of the defendant convicted therefor. The progress of education has mitigated nearly all of these penalties. Forfeiture has been abolished and the death penalty only occasionally administered. The word felony has been retained with a gradually changing meaning. It is now generally employed to designate those offenses which are punishable by imprisonment in a penitentiary or state's prison. (8) Where a jail sentence only is imposed; yet if the court could have imposed a penitentiary sentence, still the crime is a felony. (9)

A general rule for distinguishing between felonies and misdemeanors may be evolved from the fact that nearly all citizens know what crimes are punishable by imprisonment in a penitentiary or state's prison. Such crimes may usually be called felonies.

(7) See 4 Bl. Comm. 1, 5; *Adams v. Barrett*, 5 Ga., 404, 411; *Com. v. Callaghan*, 2 Va. Cas., 460; *State v. Grove*, 77 Wis., 448.

(8) This is the rule in Alabama, Arkansas, California, Georgia, Illinois, Indiana, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Missouri, New York, North Carolina, Ohio, Rhode Island, Tennessee, Texas, Vermont, West Virginia, Virginia, and in the United States courts.

(9) *People v. Hughes*, 137 N. Y. 29, 32 N. E., 1105; *Benton v. Com.* 89 Va., 570, 16 S. E., 725.

AID OF CIVIL AUTHORITIES.

Crimes which are not so punished may generally be termed misdemeanors.

99. **PEACE-OFFICERS.** At common law peace-officers were authorized to arrest in certain cases without warrants. As a general rule justices of the peace, sheriffs, coroners, constables and watchmen and all who come to their aid and assistance, including deputies, are peace-officers. (10) In many states other peace-officers have been created by statute. United States' marshals and their deputies may act as peace-officers under the laws of the state in which they act. (11) Police officers in cities are nearly always clothed with the same powers, as peace-officers, as are the state officers. Railway policemen, under general laws, are also peace-officers, as a rule.

100. **ARREST FOR FELONY OR ATTEMPTED FELONY.** It is a general rule throughout the United States that a peace-officer may arrest, without a warrant, the following persons:

a. One whom he finds attempting to commit a felony. (12)

b. One who commits a felony within view of

(10) 4 Bl. Comm., 292; 2 Hale P. C., 85, 86.

(11) U. S. Revised Statutes, (1872), Sec. 788.

(12) 3 Cyc., 878; U. S. v. Fuellhart, 106 Fed., 911; McMahon v. People, 189 Ills., 222, 59 N. E., 584.

the officer. This arrest may be made after the time of committing the crime. (13)

c. One whom he has reasonable or probable grounds to suspect of having committed a felony, even though the person suspected is innocent. (14)

101. FORCE PROPERLY USED THEREFOR. In making an arrest it is the duty of the arresting officer to summon sufficient assistance to enable him to effect his purpose. (15) An officer has no right to break an outer door or window of a residence for the purpose of entering and arresting under civil process when the person to be arrested is a lawful occupant of the house. If the person to be arrested has no legal domicile in the house where he is concealed, an outer door or window may be broken to gain admission. (16) But after having gained entrance at the outer door of a house an officer may

(13) 3 Cyc., 878; *Firestone v. Rice*, 71 Mich., 377, 38 N. W., 885, 15 Am. St. Rep., 266; *Willis v. Warren*, 1 Hilt. (N. Y.) 590; *Corbett v. Sullivan*, 54 Vt., 619; *Musco v. Com.*, 86 Va., 443; *Kurtz v. Moffitt*, 115 U. S., 487.

(14) 3 Cyc., 879; *Williams v. State*, 44 Ala., 41; *Doering v. State*, 49 Ind. 56, 19 Am. Rep., 669; *Filer v. Smith*, 96 Mich., 347; *Diers v. Mallon*, 46 Nebr., 121; *Burns v. Erben*, 40 N. Y., 463; *State v. West*, 3 O. St., 509.

(15) *Comfort v. Com.*, 5 Whart. (Pa.), 437.

(16) *Oystead v. Shed*, 13 Mass., 520; *Gordon v. Clifford*, 28 N. H., 402.

break inner doors to make an arrest even though the person he seeks is not within. Before breaking these inner doors, the officer should first state his purpose and be refused admission. (17)

As a general rule, an officer or a private person, when he is authorized to make an arrest, may lawfully use the necessary force to effect the arrest, to maintain the arrest and to prevent an escape; but he will be deemed guilty of an offense if, in doing either, he uses more than necessary force. Peace-officers are not justified in using deadly weapons on a mere suspicion that a felony has been committed.

A public officer or private citizen may take the life of a felon if it is absolutely necessary to do so in order to prevent his escape or to make the arrest. As where a robber is running from the scene of a highway robbery; or a burglar is fleeing from the house at night. Such killing must be necessary, and it behooves the officer to be careful of the conditions under which such a killing takes place, so that the necessity may not be questioned. (18)

If such felon has been arrested and others attempt to rescue the prisoner, the officer may also be justified in killing those who attempt the rescue. (19)

(17) *Ratcliff v. Burton*, 3 B. & P., 223.

(18) 21 Cyc., 796, and cases there cited.

(19) *State v. Bland*, 97 N. C., 438.

A homicide is justifiable when committed by necessity and in good faith in order to prevent a felony attempted by force or surprise, such as murder or robbery. But it may be necessary to defend such action and to show that the person killed had done certain things which plainly indicated the intention of committing the murder or the robbery. Furthermore, the killing must be done during the attempt and not after the would-be felon has desisted from the attempt. (20)

102. ARREST AFTER ESCAPE. A person properly arrested with or without a warrant may, if he escapes from custody, be rearrested without a warrant. But his escape does not always create an additional offense. Therefore, generally, no more force should be used for the last arrest than for the first. (21)

103. ARREST FOR MISDEMEANOR. No peace-officer may arrest any person who has committed a misdemeanor without first securing a warrant. But there are three exceptions to this rule, and under any one of them no warrant is needed. The exceptions are where the officer is within view when the

(20) 21 Cyc., 799, and cases there cited.

(21) 3 Cyc., 898; Cahill v. People, 106 Ill., 621; Com. v. McGahey, 11 Gray (Mass.) 194; Harft v. McDonald, 1 N. Y., City Ct., 181; Allen v. Martin, 10 Wend. (N. Y.) 300, 25 Am. Dec., 564; Rischer v. Mehan, 11 O. C. C., 403.

AID OF CIVIL AUTHORITIES.

misdemeanor is committed or is attempted. Furthermore, it is the right of the peace-officer to arrest, without a warrant, one who assaults him, or otherwise interferes with him, while he is discharging his duty as a public peace-officer. (22)

104. FORCE PROPERLY USED THEREFOR. Except in self-defense, a civil officer may not shed blood in arresting, or preventing the escape of one whom he has arrested, for an offense less than felony, even though the offender cannot be taken otherwise. (23)

105. CIVIL OFFICERS SHOULD CONFER FULL POWERS. If troops are to successfully act in the aid of civil authorities, it is indispensable that such civil authorities should give the military officer full power to use his force as peace-officers, by specific orders, and to do anything further that may be necessary to prevent affrays and breaches of the peace. It must be remembered that a civil officer cannot delegate his powers to the military officer. He must order the military officer to do certain specific things. (24) If the minor civil authorities have

(22) 3 Cyc., 881-883.

(23) This is the rule in Alabama, Arkansas, Kentucky, Mississippi, New York, Ohio, Tennessee, and is the United States rule. In Missouri and some other jurisdictions all the force necessary to overcome resistance may be used. See Sections 107, 108, 109.

(24) A regular and general deputy sheriff may

not sufficient powers, they may join with the military commanding officer in procuring from the governor a telegram outlining the further powers necessary in the emergency. Such telegram should be in

perform all the ministerial duties that a sheriff may perform; but a special deputy may only perform the particular acts ordered by the sheriff. 25 A. & E. Ency. Law, 2nd Edn., p. 675. A sheriff has power to appoint a person to do a particular act, as, to serve a certain writ, (for arrest) although such person may not be a general deputy or act under the oath required of such deputy by statute. *Procter v. Walker*, 12 Ind. 660. Chief Justice Kent, of the Supreme Court of New York, *held* with reference to a sheriff's powers: "The sheriff had come to the place to execute the process, and meeting with resistance from the house, which he had not strength to subdue, he went back to Goshen for assistance, and directed the plaintiff and others to aid and assist, in preventing, in the meantime, the escape of the rioters. He must be deemed, in this case, to have been constructively present, so as to justify an arrest of the rioters, during his temporary absence, provided he was absent on that business. The sheriff may take the power of the county, if necessary, after resistance, to execute process. Every man is bound to be aiding and assisting, upon order or summons, in preserving the peace and apprehending offenders, and is punishable if he refuses. (2 Hale's H. P. C., 86.) The sheriff is present by his authority, if he be actually engaged in efforts to resist and has commanded and is continuing to command and procure assistance. When he is calling

AID OF CIVIL AUTHORITIES.

the form of an order to the military commander. A governor will not send troops to quell a mob or riot unless civil authority is exhausted and protection of life and property demand it. (25)

106. PREVENTION OF CRIME is absolutely necessary to secure restoration of peace and order. If the orders of the military commander are as full as necessary, his forces may be used in a general round-up of the disorderly elements of the community.

When the jails are full of these people, lawlessness will begin to disappear. But in order that the military commander may gain and maintain control of the situation, the violaters of law, when arrested, must be tried without fear or favor by the proper courts. If these courts are prompt to act, they may render material aid in preventing loss of life and property.

107. AFFRAYS. An affray is of similar nature upon the power of the county, to enable him to overcome resistance, he cannot be actually present in every place where the power may be needed. The law does not require him to be an eye witness or ear witness of what occurs. If so, he could not use the power of the county. He is constructively present so long as he is in the county and is *bona fide* and strictly engaged in the business in which the power is engaged." *Coyles v. Hurtin*, 10 Johns., 85, 88. As to sheriff's civil power to quell riot, see note to Sec. 116.

(25) *Nat. Guard v. Strikers*, 26 C. C. (Penna.), 585.

to a riot. It consists in the fighting together of two or more persons, either by mutual consent or otherwise, in some public place, to the terror of the people. The suppression of affrays is dependent, in a great measure, on the right to arrest without a warrant, outlined in sections one hundred and one hundred and three.

When there is a quarrel between persons who have come to blows, or a riot, or other public breach of the peace, the duty is imposed on every one not an officer, especially therefore on every officer, to interfere in a proper manner, and separate the combatants or suppress the disturbance. A mere private person thus interfering, may even justify the killing of a rioter if it was inevitable. After the affray is ended, arrests may not be made without a warrant unless a felony has been committed. (26)

108. A BREACH OF THE PEACE may consist of a criminal act of the sort which disturbs the public repose, or of acts of public turbulence in violation of the public peace, such as a public prize fight; of an invasion of the citizens' right of personal securi-

(26) Bishop Crim. Law, 6th Edn., Sec. 534, 654; Pond v. People, 8 Mich., 150; 2 Cyc., 49-50. If rioters and other like offenders stand their ground, and only by killing them can the disorder be suppressed, they who do it are justified. Bishop Crim. Law, Secs. 14, 648, 655; 1 Hawk P. C. Curw, ed., p. 81.

AID OF CIVIL AUTHORITIES.

ty; or of acts such as tend to excite violent resentment. Actual personal violence is not always necessary to create the offense, but, when not necessary, the conduct and language of the wrong doers must be of such a character as to induce terror or fear of personal violence. (27)

109. WHAT CONSTITUTES PRESENCE OR VIEW. An offense is committed in the presence or view of an officer in several ways, namely: within eyesight of the officer, within hearing of the officer and when the officer comes within actual view before the affair is over. (28)

110. MILITARY OFFICERS' DISCRETIONARY POWERS. While military officers must perform only such aid as is required by civil authorities, they have a discretion, which they may freely use, as to the best methods to be employed to carry out an order received from civil authorities. (29)

When the mayor of a city, properly authorized by

(27) State v. Hanley, 47 Vt., 290; State v. Warner, 34 Conn., 276, 5 Cyc., 1024; Reg. v. Brown, Car. & M., 314; Bishop Crim. Law, Sec. 260, 536; State v. Lunn, 49 Mo., 90.

(28) 3 Cyc., 887; Jones v. Seward, 40 Barb., 563. When an arrest, requiring a warrant, has been made, it is presumed that the officer had a warrant, or arrested on view. Davis v. Pac. Phone Co., 127 Cal., 312.

(29) State v. Coit, 8 Ohio Dec., 62.

law, calls out troops, on the ground that a riot or mob is threatened, the military commander may, before such riot has actually taken place, be ordered by the mayor to repair to a particular place, and there perform any specific duty, such as clearing the streets, which in his judgment is necessary to prevent the threatened mob or riot. (30)

Officers of the militia, called out by a civil magistrate, under proper statutes, to aid the civil authority in enforcing the laws, cannot be entrusted with discretionary power as to the measures to be adopted, but can only direct the details of the mode of executing specific orders received from the civil magistrate. (31)

The foregoing rules were laid down by courts where civil officers were attempting to control the situation by the aid of troops. In exercising discretion as to quelling a disturbance, or carrying out other orders of the civil authorities, consultation may be had with the civil authorities, where possible, and officers will act along lines of the least resistance. They may request civil authorities to make oral proclamations at proper times. The question of resorting to rifle fire will be discussed in the next two sections. Methods of procedure are indicated in chapter sixteen.

(30) *Ela v. Smith*, 71 Mass. (5 Gray) 121; 66 Am. Dec., 356. (1857.)

(31) *Ib.*

AID OF CIVIL AUTHORITIES.

111. RESISTING ATTACKS OF MOB. If militiamen are acting lawfully in the line of their duty in suppressing a riot and the mob, or a member thereof, makes an attack upon them which endangers the life of one or more of such militiamen, rifle fire may be resorted to in resisting the attack and defending the lives of the men of the command. The rule of law that would apply in such a case is the same rule, hereafter quoted, that justifies a citizen in taking the life of a burglar as he enters the citizen's house, and protects a traveller in shooting the highway robber who demands his money. (32) Generally, in resisting such attacks, whatever force is requisite, is lawful. (33) In resisting attacks, however, it is well to bear in mind the distinction between a felony and a misdemeanor where the attack is more mischievous than serious. It should be remembered that the force requisite in resisting an attempted felony may not be safely employed in resisting an attempted misdemeanor. Verbal abuse by a mob does not of itself justify a military officer in using severe means of repression. To prevent this loud talk and oral bravery from working the mob up to overt acts, the taking of a few prisoners is sometimes advisable. Such action is really a means of defense, because an offensive defense is tactically the best de-

(32) Com. v. Shortall, 206 Pa. St., 165.

(33) Hare's Am. Const. Law, 906.

fense. If such prisoners cannot be taken without exciting the mob to some overt act of hostility, then the military officer should require from the civil authorities an order to clear the streets.

112. FIRING ON MOB. An order to disperse, then the bayonet, where practicable, will be first used. It is a general rule of the common law that, where rioters stand their ground and the riot cannot be suppressed, or the mob cannot be dispersed, without killing one or more persons, such homicide will be justified. (34)

This general rule would invariably protect a militia officer who fired on a mob under proper orders from the civil authorities, provided the mob was in the commission of a felony or attempting, by force, to commit one, and could not be restrained by milder means. But, before firing, the commanding officer should bear in mind that he may afterward be re-

(34) 21 Cyc., 798. Bishop Crim. Law, Secs. 653-5; State v. Rhodes, Houst. Cr. Cas. (Del.) 476; Bassett v. State, 44 Fla. 12, 33 So., 262; Mitchell v. State, 43 Fla., 188, 30 So., 803; Richard v. State, 42 Fla., 528, 29 So., 413; Pond v. People, 8 Mich., 150; Com. v. Daley, 4 Pa. L. J., 150. See Lynn v. People, 170 Ill., 527, 48 N. E., 964. Before any offensive move against a body of rioters it is advisable to make bystanders disperse or declare their character, as indicated in Sec. 123. See state statutes referred to in Sec. 116.

quired to prove these conditions existed. He should see that the proof exists and will be available.

Where a soldier receives what he reasonably believes to be a lawful order, from his superior officer, and kills another in the execution of such order, his action is justifiable. (35)

The general rule above stated is worded in a quotation by the Supreme Court of Pennsylvania as follows:

“When a riot assumes such proportions that it cannot be quelled by ordinary means, and threatens irreparable injury to life and property, the sheriff may call forth the *posse comitatus* and exercise an authority as their chief which can hardly be distinguished from that of a general engaged in repelling a foreign enemy or subduing a revolt. Arms may be used as in battle to bear down resistance; and if loss of life ensues, the circumstances will be a justification. The measure does not, however, cease to be civil, or fall beyond the rules which apply when a house is entered in the night by burglars, or a traveller shoots a highwayman who demands his money. Nor will it change its character because the military are called in and the

(35) See authorities cited in chapter twenty-one.

sheriff delegates his authority to the commanding officer." (36)

An officer should not make a speech to the mob in which he threatens it with rifle fire if some of its members commit a misdemeanor; nor should he make such threat conditioned upon their breaking the door of a public building. If the destruction of the door was all the officer had to fear, he should not wait until the door was destroyed in order to protect the public property. Moreover, such threats are in the nature of a dare and, for that reason, sometimes have an effect contrary to the one intended. (37)

When a threat is made to the mob, by the military officer, it should be conditioned upon some act, of the mob, which will fully authorize a commanding officer to give an order to fire. Threats of this nature are usually made when the military force is small in comparison with the size of the mob. Under such circumstances they may be the only means of procedure, and in these cases the threat should be based upon a warning to the mob not to attempt to commit an act which amounts to a felony. Offensive measures are undoubtedly better where the size of

(36) Hare's American Const. Law Lect., 14, p. 906; Com. v. Shortall, 206 Pa. St., 165, 55 Atl., 952, 98 Am. St. Rep., 759, 65 L. R. A., 193.

(37) State v. Coit, 8 Ohio Dec., 62.

AID OF CIVIL AUTHORITIES.

the military force warrants their adoption. The reason for this is that if a mob is permitted to make bluffs, it becomes more lawless and outrageous. If the military officer bluffs the mob, under proper control, the consciousness of wrong doing will assist the fears of the mob in causing its dispersal.

In dispersing the mob, care must be taken not to lose control of the troops. If rioters are followed and needlessly cut down after they have dispersed, it is murder. (38)

113. JUSTIFIABLE HOMICIDE BY CITIZENS. Two decisions to the effect that citizens may act independently in aid of civil authorities, where necessary, are as follows:

“Citizens may, on their own authority, lawfully endeavor to suppress a riot when it assumes a dangerous form, and may for that purpose arm themselves; and whatever is honestly done by them in execution of the object will be supported and justified by the common law, though it is more discreet for every one in such a case to be assistant to the justices and sheriff in doing so.” (39)

“Private persons may forcibly interfere

(38) Hare's Am. Const. Law, 922.

(39) Commonwealth v. Hare, 2 Clark, 467, 4 Pa. Law J., 257.

to suppress a riot or resist rioters; and they may justify homicide in so doing, if they cannot otherwise resist them, or defend themselves, their families or their property." (40)

It would seem from this that where a militia company was on duty and a riot occurred in its immediate vicinity, it might, where the emergency was great and the necessity apparent, act independently in suppressing a riot. But extreme caution must be exercised in an act of this nature because, under many of the state constitutions, it is provided that the military shall always be subject to the civil power, and this provision would require the civil power to act first.

114. HOMICIDE WHEN RIOTERS RESIST ARREST. A decision of the State of Pennsylvania lays down this rule:

(1844) "In the suppression of dangerous rioters the sheriff and his assistants may arrest, detain and imprison rioters; and, if they resist and continue their riotous actions, killing them becomes justifiable." (41)

But in the general application of the rule just

(40) Pond v. People, 8 Mich., 150.

(41) Com. v. Daley, 2 Clark, 361, 4 Pa. Law J., 150.

stated, it is well to bear in mind the provisions of section one hundred and one and the distinction between felony and misdemeanor. (42)

115. PROTECTING PRISONER. It is the duty of a military officer, in command of a military organization, called to protect a person under arrest from a mob, to use only such force as is necessary to protect the prisoner, and the public property.

And such officer cannot legally take human life, in accomplishing those ends, until he has ascertained, by such careful, prudent and reasonable exercise of his faculties as circumstances permit, that it is necessary to accomplish the purpose in hand. (43)

116. STATE STATUTES CONTROL RIOT DUTY. When state troops are aiding minor civil authorities of the same state, the statutory provisions of that state, relative to quelling riots, may be followed. (44)

(42) And see Sec. 116.

(43) State v. Coit, 8 Ohio Dec., 62.

(44) 22 Cyc. page 1452; Orr v. New York, 64 Barb. (N. Y.) 106; Greer v. New York, 3 Rob., (N. Y.) 406; St. Micheal's Church v. Philadelphia county, Brightly (Pa.), 121. "One reason why there have been so few prosecutions in our state courts on account of the consequences of firing upon rioters, probably is that the statutes of a considerable number of the states, in recognition indeed of a common law principle, expressly disclaim the holding liable of officials and others concerned in such firings." Winthrop's Mil. Law & Prec., p. 1397.

Statutes of many of the states expressly declare that a homicide is justifiable in the suppression of a riot. (45)

117. TERRITORIAL LIMITS. The Supreme Court of New York, in a case growing out of the destruction of the American steamer *Caroline*, in waters of the United States, by Canadian militia (Dec. 30, 1837), lays down this *dicta*:

“A soldier, in time of war between us and England, might be compelled by an order from our government to enter Canada and fight against and kill her soldiers. But should Congress pass a statute compelling him to do so on any imaginable exigency, or under any penalty, in time of peace; if he should obey and kill a man, he would be guilty of murder.” (46)

(45) Such statutes have been enacted in California, Idaho, Indiana, Massachusetts, Missouri, New Hampshire, New Jersey, Ohio, Oregon, Vermont, Virginia, West Virginia, Wisconsin and other states. Their provisions usually indicate the powers of the civil officers.

(46) *The People v. McLeod*, 1 Hill (N. Y.) 377, 426; “A sovereign cannot compel a man to go into a neighboring country, whether in peace or war, and do a deed of infamy. This is exemplified in the case of spies. A sovereign may solicit and bribe; but he cannot command. A thousand commands would not save the neck of a spy, should he be caught in the camp of the enemy.” (Vattel, B. 3, ch. 10, Sec. 179.)

AID OF CIVIL AUTHORITIES.

As it is impossible, under the U. S. Constitution, for one state of our nation to declare war against another, or against a foreign power, it follows that state troops, on duty in state service, must absolutely confine their operations within the boundaries of the state they serve.

When acting under call of, and by direction of, a minor civil authority, it may be necessary to secure the order of the governor before extending operations beyond the city, district or county over which the civil commander has jurisdiction.

CHAPTER TEN.

CO-OPERATION WITH CIVIL AUTHORITIES.

118. DISPUTES BETWEEN CIVIL OFFICERS may sometimes arise during the progress of a riot or tumult. To illustrate: A mob is threatening lawless operations at a factory near the boundary line of a city. The mayor and the county sheriff are both authorized by law to call for troops. These officers have different views as to the character of the emergency, and as to the necessity for and the manner of using troops. The military commander is thus placed in a delicate situation because the two civil officers may have concurrent jurisdiction over him. The military officer, having no judicial duties to perform as long as the civil officers are in control, cannot decide as to which civil officer is giving the proper directions. But, under these circumstances, the military officer may be able to make a shrewd guess as to which civil officer is right. Under these circumstances the military officer must truthfully report the facts to the governor and secure a decision which will protect him in future operations. In securing this decision he may ask for

directions as to which civil officer he shall serve. He may even be required to arrest a civil officer who is wrongfully using his authority and thereafter act under another civil authority, who had concurrent jurisdiction with the one arrested; but who is, in the opinion of the governor, acting rightfully in attempting to subdue the disturbance. The governor has the power to make this decision. (1)

119. QUALIFIED MARTIAL LAW. Under some of the circumstances, indicated in the preceding section, it may be necessary to resort to a partial degree of martial law, namely: where by the decision of the governor a military officer is required to act under the orders of the sheriff and to supersede the mayor in his control of affairs within the city, or conversely where the sheriff is superseded and the mayor is upheld. Under these difficult circumstances the orders from the governor will doubtless require the military officer to co-operate with that civil authority whom the governor decides to be rightfully performing his duties. If the military commander, under these or similar conditions, is required to take full control of the civil affairs of a certain part of any community, such control may require the exercise of full martial law powers and

(1) Luther v. Borden, 7 How. (U. S.) 40; Sec. 120.

may be designated as co-operative martial law. (2)

120. DEGREE OF CO-OPERATION. Where, under circumstances indicated in the last preceding section, the military commander is required to co-operate with one authority and supersede another, the question is simpler if the military officer is ordered to adhere to the plan adopted by the sheriff whose jurisdiction as a peace-officer includes the city as well as the county. Under such circumstances, the orders of the sheriff would have force in any part of the county, and it would, in most instances, be proper for the governor to direct the sheriff to assume control of the preservation of the peace in the city until a new mayor could be properly inducted into office or the old one brought to see the right.

But where the sheriff is superseded, the mayor, having no jurisdiction outside the city, could not direct affairs beyond the city limits, and in these outside districts the military commander might be ordered to assume supreme control and carry out the will of the governor until order was restored. Under the circumstances last recited, the military commander would act under the mayor within the city (subject, of course, to orders of the governor), but would act solely under the governor's order in the remainder of the county.

(2) See Sec. 193.

121. PRISONERS. In the foregoing situation, where the mayor had been superseded, the military officer would have, under control of the sheriff, jurisdiction over the city prison and probably of the police force. Where the sheriff was superseded, the county jail would probably be under the jurisdiction of the military officer, and would be, for the time being, a military prison. The state prisoners there incarcerated under the orders of the civil authorities would be under the orders of the governor.

122. WHERE A GOVERNOR ACTS INDEPENDENTLY OF CIVIL AUTHORITIES. The governor may dispense with certain statutory formalities where the emergency requires it and the state constitution permits him to do so. Under a statute of the State of Washington, the governor in suppressing riots was required to first :

“Request the local authorities to suppress such riot, * * * and, if they fail, neglect, or are unable to do so, he shall issue his proclamation commanding such persons to disperse, * * * and if thereafter such imminent danger still continues, the governor shall proceed to suppress the same by calling into action all the force necessary to accomplish that purpose.”

But under the constitution of that state the governor was given power to call forth the militia to

execute the laws of the state. And it was held by the Supreme Court that the course of action prescribed by the statute was not binding on the governor when, in his judgment, the danger of riot was so imminent as not to permit of the delay necessary to so many formalities. (3)

Where the governor proceeds to act directly, without specific reference to the civil authorities, the military commander will nevertheless co-operate with such of the authorities as are in accord with the governor's plans and will permit them to exercise their usual functions as fully as is consistent with the orders of the governor. Under these conditions, the machinery of civil government would be disturbed only where it was necessary to do so in order to carry out the orders received by the military commander from the highest civil authority of the state.

123. SEPARATING RIOTERS FROM CITIZENS. It has been held that, in riotous and tumultuous assemblies, all who are present and not actually assistant in their suppression are, in the presumption of law, participants; and the obligation is cast upon a person so circumstanced to prove, in his defense, his actual non-interference. Where, however, the sheriff, or any known conservator of the public

(3) Chapin v. Ferry, 3 Wash. St., 386, 28 Pac. 754, 15 L. R. A., 116.

peace, commands the dispersion of an unlawful or riotous assembly, there can be no neutrals, and a passive looker on, who remains on the spot, refusing to take part in aid of the suppression of the riot, is a principal in the riot.

Under this rule of law a civil officer acting under lawful orders is able to ascertain the character of the assembled crowd. He may by this means brand, in rare instances, even civil authorities as rioters; but could only do so when acting by the direction of other civil authorities or the governor. Where civil authorities have elected to share the lot of the rioters the disturbance amounts to an incipient insurrection, and more drastic measures are necessary than in the case of a riot. Some degree of martial law will be necessary and the governor must be kept advised of the turn of affairs so that he may be able to issue the necessary orders.

124. CONCURRENT MARTIAL AND CIVIL LAW. After martial law is declared an officer may lawfully arrest one whom he has reasonable grounds to believe is engaged in the insurrection, or may order the forcible entry of a house. But no more force can be used than is necessary to accomplish the object; and if the power is used for the purpose of oppression, or if any injury is willfully done to person or property, the person by whom or by whose

order it is committed will be answerable. (4)

Where the military commander and certain civil authorities are co-operating to suppress a riot or insurrection, martial law may be employed to supply those branches of the existing civil government which are absent and as a substitute for those functions which the civil authorities have ceased to exercise. In this way martial law only supplements the civil law; it upholds those authorities who are exercising their proper civil powers and rounds out the government by furnishing those powers which are absent or inert. In cases of this nature the military commander must, as at all other times, remember that he is only temporarily in command and that his actions are subject to review as soon as civil government can be re-established. It may be repeated here that when a military commander is exercising military government in a foreign territory he is responsible only to God and his superior officers; but while exercising martial law in his home country he is responsible, not only morally and to military law, for any misconduct, but he may afterwards be held responsible to the people and the state. It is nevertheless the duty of the military commander to obey the lawful orders of the governor and, if such orders are specific, he may obey them without fear of the consequences.

(4) *Luther v. Borden*, 7 How. (U. S.) 1.

125. **HABEAS CORPUS.** It is a general rule that the President of the United States may not suspend the writ of habeas corpus, throughout the whole of the United States, without the aid of legislative authority. But it is now generally conceded that the president, notwithstanding the provisions of the federal constitution, may suspend the writ within any territory affected by an existing state of insurrection. (5) The essence of martial law is the suspension of the writ of habeas corpus and a declaration of martial law would be useless unless accompanied by suspension of the privileges of such writ. (6) It would therefore seem that in the situations indicated in sections one hundred and eighteen and one hundred and nineteen, and in similar situations, the military commander, in districts where the civil peace officers had been superseded, might detain prisoners on his own authority and confine them, for the public good, until all violence had subsided and civil power was re-established. But this power should only be exercised where the military commander had secured specific orders to that effect from the governor.

126. **RIVAL CIVIL AUTHORITIES.** Until the adoption of the constitution of 1843, Rhode Island

(5) *Ex parte* Milligan, 4 Wall. (U. S.) 142; *Griffin v. Wilcox*, 21 Ind., 370, 386. See Secs. 201, 217.

(6) *Luther v. Borden*, 7 How. (U. S.) page 1.

drew its fundamental law from a charter issued by Charles II in 1663. During all this time its so-called charter government existed. About the close of this period a Mr. Dorr headed a reform party which adopted what was styled a new state constitution and elected state officers under it. This was done against the protest of the existing charter government. Both factions claimed to represent a majority of the citizens of the state. An armed insurrection, under Dorr, was organized for the purpose of overthrowing the charter government. The charter government appealed to the president who finally instituted measures for its protection against Dorr's forces, then in arms. At the time of the president's decision a battle seemed imminent; but the action of the federal government, in deciding for the charter government, almost instantly caused the dispersal of Dorr's forces and the restoration of peace.

The supreme court of the United States, in a case involving some of the foregoing facts held that it, as a court, had no power to decide which of the rival governments of Rhode Island was the lawful one. That this power resided in the political branch of the government and that congress, by general laws under Article 4, Section 4, of the federal constitution, had given the president the power, and imposed on him the duty, to guarantee each state a republican form of government. And that part of the

president's duties in this behalf consisted in his exercise of the right to decide whether or not the Rhode Island charter government was lawful, or had been displaced. When the president so decided, the courts were bound to take notice of the decision and act under the direction of the recognized government. On this point the court conclude by saying:

“And if a state court should enter upon the inquiry proposed in this case, and should come to the conclusion that the government under which it acted had been put aside and displaced by an opposing government, it would cease to be a court, and be incapable of pronouncing a judicial decision upon the question it undertook to try.” (7)

The foregoing facts and opinion are set out in full because the principle involved is one of manifestly great importance. Applied to a certain locality in any state this principle declares that the courts must uphold the other branches of the government and must not interfere with their exercise of constitutional powers. Where the constitutional laws of a state direct the governor to execute the laws, the courts can not interfere with his discretionary acts. Moreover, if, under these same laws, the gov-

(7) Luther v. Borden, 7 How. (U. S.) 40.

ernor is compelled to decide which of two rival candidates for civil office is the rightful one, such decision is an exercise of the political power which is not vested in the courts and the courts cannot disturb the decision unless it is in plain violation of the governor's constitutional powers. To illustrate: If two rival candidates are both claiming the office of mayor of a city, and the public peace is disturbed by the factions following these rivals, it is the duty of the governor to maintain the peace thus disturbed. In addition to this duty and under proper constitutional provisions it may be the duty of the governor to decide which of the rivals is, in fact, entitled to act as mayor. After this last decision has been made it will probably be the duty of the military commander, on duty at the scene of disturbance, to either co-operate with the declared mayor, or act under his direction.

The questions indicated in this section are too complex to permit of a full discussion here and what has been said may be considered solely as a guide to a fuller investigation of the points that may arise.

CHAPTER ELEVEN.

OUSTING AND REPLACING CIVIL AUTHORITIES.

127. GOVERNOR DECIDES WHEN CIVIL AUTHORITIES SHOULD BE REPLACED. Mr. John M. Waldron, of the Colorado bar, in a brilliant argument in the supreme court of that state, said:

“The Constitution of this state makes the governor the commander-in-chief. It imposes upon him the duty of suppressing insurrection by armed force. He can not shirk that duty; he can not delegate it to anybody else except under his own supervision and control. It is a constitutional grant of authority. Does it say that when the governor arrives on the scene of action with his troops he ceases to be commander-in-chief, and that some local officer who, up to the moment of the arrival of the military, might possibly have been afraid to show his head without the confines of his own hearthstone, shall control the military forces of the state? Does it say that the governor must abdicate his functions to the sheriff and the sheriff be the commander-in-chief of the military forces? Not a word, not a syllable, in the Constitution declares anything of

ousting civil authorities.

the sort. Something may be tortured out of the statutes of this state by which the governor, when he arrives on the scene of action, should allow the local authorities, if there are any, to assume charge of the military forces, but any statute that undertakes to strip the governor of this state of his constitutional powers and duties is void. He is the commander-in-chief. The militia, when they are on the ground, are not civil forces; they are military forces. For the time being, by virtue of the exigencies of the situation, they are the paramount power, because all civil law is dormant—it does not exist.”

The foregoing statements were, in effect, held to be good law by the court. The decision, however, was based on the fact that an entire county, in the mining region, was in a tumult of lawlessness which amounted to insurrection. (1)

As has been heretofore shown in section twenty-eight it is an unquestioned rule of law that where the governor's constitutional powers permit him to call out troops to suppress domestic disturbances, his decision that an emergency has arisen which requires such call, is final and cannot be questioned. This power is not abridged by the provision found in so many state constitutions that: “The military shall always be in strict subordination to the civil

(1) In re Moyer, 85 Pac., 190.

power." Such a provision is found in the constitution of New Jersey, but the supreme court of that state held that:

"It is true that whole cities or districts may, on great emergencies, from the necessity of the thing, be declared to be under martial law, and be subjected to all the rules of war by a military commander; and in that case the power of the civil courts is wholly superseded." (2)

The highest courts of Pennsylvania and other states declare the same doctrine. (3) Were this right denied the chief executives of the states, it would be necessary for the federal government to constantly interfere with the executive functions of the various state governments.

There are rare instances, however, where the state legislature is constitutionally endowed with certain functions which properly belong to the governor. As these instances are but exceptions to the general rule, and can be easily determined by a short study of the student's own state constitution, they will not be discussed in this work.

128. GOVERNOR MAY ACT SUMMARILY. With reference to the governor's powers, in preserving the

(2) Kirkpatrick, C. J., in *State v. Davis*, 4 N. J. L. (1 Southard), 311, 312.

(3) *Appeal of Hartranft et al.*, 85 Pa. St., 433; *Chapin v. Ferry*, 3 Wash., 386, 28 Pac., 754; *In re Moyer*, 85 Pac., 190.

peace and executing the lawfully declared will of the people, the supreme court of Pennsylvania, say:

"What, then, are the duties, powers and privileges of the governor? In the language of the Constitution, article 4 section 2, 'The supreme executive power shall be vested in the governor who shall take care that the laws be faithfully executed.' Also same article, section 7, 'The governor shall be commander-in-chief of the army and navy of the commonwealth, and of the militia, except when they shall be called into the actual service of the United States.' He is, also, invested with the appointing and pardoning powers; the power to convene the legislature in cases of emergency, and to approve, or veto, bills submitted to him by the general assembly. It is scarcely conceivable that a man could be more completely invested with the supreme power and dignity of a free people. Observe, *the supreme executive power* is vested in the governor, and he is *charged with the faithful execution of the laws*, and for the accomplishment of this purpose he is made commander-in-chief of the army, navy and militia of the state. Who, then, shall assume the power of the people and call this magistrate to an account for that which he has done in discharge of his constitutional duties? If he is not the judge of *when* and *how* these duties are to be performed, who is? Where does the Court of Quarter Sessions, or any

OUSTING CIVIL AUTHORITIES.

other court, get the power to call this man before it, and compel him to answer for the manner in which he has discharged his constitutional functions as executor of the laws and commander-in-chief of the militia of the commonwealth? * * * We had better, at the outstart, recognize the fact that the executive department is a co-ordinate branch of the government, with power to judge what *should* or *should not be done, within its own department*, * * * and that within the exercise of these constitutional powers, the courts have no more right to interfere than has the executive, under like conditions, to interfere with the courts." (4)

On the same point a recent declaration of the supreme court of Idaho is, in part, as follows:

"It is no argument to say that the executive was not applied to by any county officer of Shoshone county to proclaim said county to be in a state of insurrection, and for this reason the proclamation was without authority. The recitals in the proclamation show the existence of one of two conditions, viz.: That the county officers of said county, whose duty it was to make said application, were either in league with the insurrectionists, or else, through fear of the latter, said officers refrained from doing their duty. Under the circumstances, it was the

(4) Appeal of Hartranft et al., 85 Pa. St., 433, 444-5.

ousting civil authorities.

duty of the executive to act without any application from any county officer of Shoshone county." (5)

The constitutional provisions under which these two declarations of law were made are those commonly found throughout the union, and the rules so enunciated are not affected by the additional constitutional provision, often found, prescribing that the military shall be in strict subordination to the civil power. Therefore it is a general rule that the governors of the states, in seeking to maintain order within their respective states, have greater powers than has the king of England within the British Isles. The governor, when his duty requires him to act, is accountable to no man for the performance of that duty. He is accountable to no man for the reasonable exercise of his discretion. Therefore, as a general rule, he may use any necessary force to prevent a threatened violation of the law of his state and, when the governor acts under proper constitutional authority, neither the legislative nor the judicial branch of the government may prescribe rules which restrict him in the performance of his duties. Neither of these co-ordinate branches of the government should seek to restrict the executive branch, for it is their duty to aid, in every way possible, in enforcing the laws which they proclaim. If this were not true, then we would have the mon-

(5) In re Boyle, 57 Pac., 706-7.

ousting civil authorities.

strous condition of a law-abiding citizen being punished for obeying the very law which was laid down by the authority which afterwards administered the punishment.

129. DELEGATION OF POWERS TO MILITARY COMMANDERS. When the chief executive of the state has decided to oust civil authorities, or replace them, or act independently of them, he issues specific orders whereby a military officer is required to take charge of the situation and use the necessary force to put down the insurrection. These orders, received from time to time from the governor, constitute all the authority which the military commander has in the premises. He will therefore confine himself to a strict adherence to his orders and when any doubt arises will request further directions.

130. PROCLAIMING MARTIAL LAW. Experience has shown that a proclamation is, in some instances, of great benefit in subduing domestic disturbances. The president of the United States can not act, under the laws set out in section forty-two, without first issuing the proclamation there prescribed. The statutes of some of the newer states have followed the federal plan and prescribed that the governor shall issue a proclamation before using force to subdue an insurrection. But it has been shown that in extreme emergencies the governor may dispense

with this formality. (6) The matter of issuing a proclamation is probably within the discretion of the governor and he may cause one to be issued whenever he determines that good will result therefrom.

When such proclamation is issued by the governor it is, in effect, the establishment of at least qualified martial law in all cases where the governor is not acting strictly in aid of the minor civil authorities. Such proclamations will be discussed in the next chapter.

131. ESTABLISHING MARTIAL LAW WITHOUT PROCLAMATION. It has heretofore been shown that the governor may establish a certain degree of martial law without the issuance of a preliminary proclamation. (7) The governor's order requiring troops to act independently of civil authorities in enforcing the laws, alone establishes martial law; but as all acts of this nature are subsequently reviewed and discussed, often by persons ignorant of the facts, it is usually advisable to publish, by proclamation, the facts which have required the use of troops and martial law. Such publication will, in certain instances, save future adverse criticism of the governor's actions and prevent the creation of political thunder by adverse factions. Any import-

(6) See Sec. 122.

(7) See Sec. 122.

OUSTING CIVIL AUTHORITIES.

ant action by a governor, if taken secretly, is likely to result in future discussions which are sometimes in bad taste and may cause embarrassment. Such discussions put the governor on the defensive and, while no chief executive can be required to defend his lawful actions, these discussions furnish a disagreeable incident which is subversive of that cordial co-operation which should always exist between a governor and the people. There are times when a proclamation is not possible, there are other times when it is not advisable; but, generally, it may be employed to advantage.

132. OUSTER BY ARREST. To oust means, legally, to put out; to turn out or eject; to dispossess. (8)

When proof is certain that a civil officer has cast his lot with insurgents, or has been guilty of riot, in violation of law, the military commander may be ordered to put such delinquent in arrest. (9)

A rioter has been legally defined as one who inflames people's minds, and induces them by violent means to accomplish an illegal object, and it is not necessary that he should take any part in the riot, but it is sufficient if he sets in motion the physical

(8) 3 Bl. Com., 167-173, 201, 202; Burrill's Law Dict.

(9) 3 Cyc., 874; 43 Cent. Dig., cc. 3913-3916.

ousting civil authorities.

power, of another, which results in a riot. (10)
If these same acts were performed in furtherance of an insurrection, the delinquent would be an insurgent.

As, however, a civil officer apparently trying to properly perform his duty cannot be arrested, the occasions when it will be necessary to arrest him in order to oust will be extremely rare and on these occasions the governor might simply treat the civil officer as a lawless private person. He will then remove him and may at once appoint a successor. (11)

133. OUSTER BY INDEPENDENT ACTION. The plan commonly adopted by a governor in suppressing insurrection is, either with or without public proclamation, to issue specific orders to a military commander to restore order and enforce the laws in a described district. Thereafter the military commander establishes a military district which territorially covers the one described in the governor's order. Either the governor or military commander then issues whatever orders or proclamations are necessary to establish and maintain the requisite degree of martial law. (12)

(10) 1 Spies v. People, 12 N. E., 865, 961; 122 Ill., 1; 3 Am. St. Rep., 320.

(11) Birkhimer, Mil. Govt. & Mar. Law, 496.

(12) See succeeding chapters.

ousting civil authorities.

134. **DISARMING AUTHORITIES.** Immediately upon assuming control the military commander may, if the emergency requires, issue an order requiring all fire arms to be deposited with the military at a certain place. He may also issue an order forbidding the sale or importation of fire arms and deadly weapons. The orders relative to fire arms will necessarily be proclamations because of their public character. In these orders the military commander may specify that all civil officers, constables, sheriffs, marshals, and other peace-officers shall deposit their arms until they obtain permits for their use. These permits will then be issued in the discretion of the military commander.

135. **REINSTATING CIVIL AUTHORITIES.** As the insurrection is gradually suppressed, orders may be issued from time to time reducing the first degree of martial law established, and gradually reinstating the civil officers, or their successors, to the full exercise of their proper functions. When order is completely restored a proclamation to that effect will sometimes be advantageous. This proclamation may be in the form of a military general order requiring the military commander to turn the government over to the proper civil officers.

136. **ESTABLISHMENT OF MILITARY COMMISSIONS.** The authority to appoint martial law courts and approve their sentences, during the civil war,

ousting civil authorities.

rested only with the commanding general. (13) This power might be exercised by military commanders of districts, in state service during insurrection, but the better plan would be to create such commission by order of the commander-in-chief. No such commission will act or be created, unless the civil courts have ceased to properly perform their functions. As the rules governing the procedure of courts-martial are nearly always adopted for the procedure of military commissions, a general court-martial may be ordered and this same general court (or certain of its members) (14) may, by order, be given authority to act as a military commission. In this way it would apply the well known rules of military law in the trial of accused members of the military forces and camp followers. It would also, in the trial of all other persons, apply the laws of the land, or, failing these, the custom of war in like cases. Where any of the civil courts can be induced to act, a system of co-operation will be arranged.

137. JURISDICTION OF MILITARY COMMISSIONS. As to the jurisdiction exercised by military commissions it has been said that :

(13) Birkhimer, Mil. Gov. & Mar. Law, 527; 4 Wallace, p. 13.

(14) Custom has fixed the minimum number, composing a military commission, at three. Davis Mil. Law, p. 309.

ousting civil authorities.

"Military commissions, as a rule, should be resorted to for cases which cannot be tried by courts-martial or by the proper civil tribunal. They are, in other words, tribunals of necessity, organized for the investigation and punishment of offences which would otherwise go unpunished."
(15)

As to the vaddity of the decisions of this commission, the general sentiment seems to be as follows:

"Nor is there perceived any ground upon which can be based a well-founded claim that the decisions of martial-law tribunals, proceeding within the sphere of their jurisdiction, are less determinate in character than are those of the ordinary courts-martial." (16)

The decisions of these commissions have been upheld by the supreme court of the United States where the commission had been properly established. (17) Where a governor declares a cer-

(15) Birkhimer, Mil. Gov. & Mar. Law, 528; R. S. I., Vol. 8, p. 822.

(16) *Ib.*, 529.

(17) *Mechs. & Traders Bank v. Union Bk.*, 22 Wallace, 276; *Texas v. White*, 7 Wallace, 400; *Handlin v. Wickliffe*, 12 Id., 173; *Rutledge v. Fogg*, 3 Cold., 554.

tain district in insurrection and establishes absolute martial law, and military commissions under it, and civil courts cannot enforce their process because of the disturbance; it would, afterward, be very unreasonable for these same civil courts to declare that, because their powers were dormant, no other lawful powers had been exercised.

138. INVOKING FEDERAL AID. When the chief executive of the state finds that an insurrection, therein, is beyond his control and beyond the control of his state military forces, it is his duty, under Section 5297 of the United States Revised Statutes, which is set forth in section forty-two of this work, to apply to the president of the United States for federal aid. The manner of making this application is indicated in section forty-three.

139. CONTROL OF FEDERAL TROOPS. The federal statutes set out in section forty-two authorize the president of the United States to use troops for two distinct purposes, namely:

First. He may use troops without request, even against the protest of the state authorities, in order to carry out the guarantees of the federal constitution.

Second. He may use troops, when requested by the legislature or governor of a state, in co-operation with the civil authorities of that state in suppressing insurrections.

ousting civil authorities.

As to the first of these uses, the president's control is absolute. It has been defined as follows:

"When the President proceeds to use the military power of the nation for the objects mentioned, he does it independently of state authorities. When necessary, he moves the troops to the threatened district. It may be against the protests of the state authorities. He uses the requisite force to sustain the law, suppress rebellion, or to repel invasion. The law intrusts to his judgment the determination of the question how much force the occasion demands. He is expected to meet the crisis. He takes his measures accordingly, and if the condition of affairs be such as to justify the enforcement of martial law, it will be his duty to enforce it." (18)

As to the second of these uses the practice has been, where the governor has invoked federal aid, for federal troops to co-operate with either the state civil authorities or state troops or both; but the same thing can be said of this situation as of the situations indicated in chapter nine, namely:

Where the governor is aiding civil authorities he is the chief civil authority, as well as the com-

(18) Birkhimer Mil. Gov. & Mar. Law, p. 460;
7 Howard, p. 1; 4 Wallace, p. 2; 21 Indiana, p. 370.

ousting. CIVIL AUTHORITIES.

mander-in-chief, and his orders are superior to all others. Where the president is co-operating with civil authorities he is the chief civil authority as well as commander-in-chief of the federal forces. Therefore the president's orders are superior to all others. If the president chooses to order his military officer to co-operate with state troops in executing the will of the governor; then there is but one head to the force which is engaged in suppressing a state insurrection. If the federal military officer is directed to act independently of the state forces: then there may be two heads to the forces which are working for law and order and, while the situation may become delicate, there is no necessity for actual friction where co-operation is executed with judgment and courtesy. In the Idaho disturbances of 1892, the governor invoked federal aid and the president issued his proclamation. Meanwhile both federal and state troops had been moved to the scene of action. The commander of the latter represented the governor in the field. He exercised martial law powers fully, removing the sheriff and appointing a successor. No formal proclamation instituting martial law was made other than the preliminary one of the governor, but martial law was fully exercised until peace and order were restored. The exercise of martial law was by state not federal authorities.

ousting civil authorities.

The federal forces upheld the state authorities by their presence and co-operation. (19)

(19) Fed. Aid in Dom. Dis., W. D., 223. On this occasion President Harrison ordered the secretary of war to: "At once send to the scene of disorder an adequate force of troops from the nearest station, under an officer of rank and discretion, with orders to co-operate with the civil authorities in preserving the peace and protecting life and property." Federal troops can not be directed to act under the orders of any civil officer. A. R., 1904, par. 487.

CHAPTER TWELVE.

PROCLAMATIONS.

140. **STATUTORY REQUIREMENTS.** The federal statutes, shown in section forty-two, are mandatory, and probably require the president to issue a proclamation before using federal troops, either in co-operation with civil authorities or acting independently in suppressing insurrection. Similar statutes, which exist in some of the states relative to preliminary proclamations, need not be followed by the state executive where adherence to such statute would cause dangerous delays. (1) But if the constitutional authority under which the governor acts indicates that a proclamation should be issued before using force, such constitutional requirement is mandatory and cannot be ignored.

141. **FORM OF FEDERAL PROCLAMATION.** A federal proclamation used by President Grant in 1874 was immediately effective in removing the imminent danger of a civil war in Arkansas. The difficulties arose, as in the Dorr rebellion, out of a contest between two persons for the governorship of that state. When it had been demonstrated to

(1) See Secs. 122, 130.

PROCLAMATIONS.

the president that intervention by him was absolutely necessary, he recognized Baxter as the governor in the following proclamation:

“BY THE PRESIDENT OF THE UNITED STATES OF AMERICA.

A PROCLAMATION.

Whereas, certain turbulent and disorderly persons, pretending that Elisha Baxter, the present executive of Arkansas, was not elected, have combined together with force and arms to resist his authority as such executive and other authorities of said State; and

Whereas, said Elisha Baxter has been declared duly elected by the general assembly of said State as provided in the Constitution thereof, and has for a long period been exercising the functions of said office, into which he was inducted according to the constitution and laws of said State, and ought by its citizens to be considered as the lawful executive thereof, and

Whereas, it is provided in the Constitution of the United States that the United States shall protect every State in the Union, on application of the legislature, or of the executive when the legislature

PROCLAMATIONS.

can not be convened, against domestic violence; and

Whereas, said Elisha Baxter, under Section 4 of Article IV of the Constitution of the United States and the laws passed in pursuance thereof, has heretofore made application to me to protect said State and the citizens thereof against domestic violence; and

Whereas, the general assembly of said State was convened in extra session at the capital thereof on the 11th instant, pursuant to a call made by said Elisha Baxter, and both houses thereof have passed a joint resolution also applying to me to protect the State against domestic violence; and"

(Here followed quotations from the provisions of the statutes set out in section forty-two of this work.)

"Now, therefore, I, Ulysses S. Grant, President of the United States, do hereby make proclamation and command all turbulent and disorderly persons to disperse and retire peaceably to their respective abodes within ten days from this date, and hereafter to submit themselves to the lawful authority of said executive and the

PROCLAMATIONS.

other constituted authorities of said State; and I invoke the aid and co-operation of all good citizens thereof to uphold law and preserve public peace.

In witness whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the city of Washington, this 15th day of May, in the year of our Lord one thousand eight hundred and seventy-four, and of the Independence of the United States the ninety-eighth.

(SEAL.)

U. S. GRANT.

By the President:

HAMILTON FISH, Secretary of State." (2)

The foregoing proclamation was necessarily long for the reason that the president was compelled to decide which of two state governments was the legal one. If this requirement had not existed, the preliminary statement of facts could have been drawn in a single paragraph, as was done by President Hayes in 1877, as follows:

"And whereas, the governor of the State of Pennsylvania has represented that domestic violence exists in said State which the authorities of said State are unable to suppress." (3)

(2) Fed. Aid in Dom. Dis. War Dept., p. 176.

(3) Ib., p. 196.

PROCLAMATIONS.

The foregoing forms of federal proclamations are here inserted to indicate the course that a chief executive of the federal government usually takes in these emergencies.

142. FORM OF A STATE PROCLAMATION. The governor of Colorado recently issued the following proclamation:

"State of Colorado,
Executive Chamber, Denver.

PROCLAMATION.

Whereas, There exists in Las Animas county, State of Colorado, a certain class of individuals who are fully armed and are acting together, resisting the laws of this State and offering violence to citizens and property located in said Las Animas county; and

Whereas, At divers and sundry times various crimes have been committed in Las Animas county by said individuals, or by and with the aid and under the direction of said vicious and lawless persons; and

Whereas, From time to time attempts have been made to destroy property in said county by the use of dynamite or other explosives, which would have resulted in the destruction of a vast amount

PROCLAMATIONS.

of property and considerable loss of life;
and

Whereas, Threats, intimidations and violence are daily threatened and frequently resorted to by said lawless class of individuals; and

Whereas, The civil authorities of said Las Animas county have notified me that there is a great body of unemployed men in said Las Animas county, who are arming themselves with deadly weapons in apparent anticipation of an open and violent conflict, without any respect for our government or its Constitution and laws; and

Whereas, it is estimated by the sheriff of said Las Animas county that not less than fifteen hundred men are fully equipped with shot guns, rifles, pistols and deadly weapons, thoroughly instructed in their use, and ready for prompt action; and

Whereas, such outbreak of violence, in opposition to the Constitution and laws of this State is imminent, which would involve serious destruction of property and the loss of life to many innocent citizens; and

PROCLAMATIONS.

Whereas, by reason of such lawlessness, acts of violence and disturbances, the civil authorities are unable to cope with the situation;

Now, therefore, I, James H. Peabody, governor and commander-in-chief of the military forces, by virtue of the power and authority in me vested, do hereby proclaim and declare the said county of Las Animas, in the State of Colorado, to be in a state of insurrection and rebellion.

In testimony whereof, I have hereunto set my hand and caused to be affixed the great seal of the State, in the city of Denver, the State capital, this twenty-second day of March, A. D. one thousand nine hundred and four.

(SEAL) (Signed) JAMES H. PEABODY.

By the Governor, Attest:

(Signed) JAMES COWIE,
Secretary of State." (4)

The foregoing proclamation does not follow the federal plan in warning the insurgents to disperse by a given time. It was probably the governor's understanding that such a warning would not be heeded; but where such warning may be of benefit

(4) Biennial Report, Adjutant General of Colorado, 1903-4, p. 17.

PROCLAMATIONS.

it is advisable to incorporate it in the proclamation. The use of the word "rebellion" is possibly open to objection.

143. RECITALS IN PROCLAMATIONS. The recital of facts in a proclamation shows the conditions which caused it to be issued. These facts should be ascertained as carefully as time permits. The officer believes the conditions exist and the discretion he thereupon exercises cannot be questioned. With reference to this principle the supreme court of Idaho said:

"The truth of recitals of alleged facts in a proclamation issued by the governor, proclaiming a certain county in the State to be in a state of insurrection and rebellion, will not be inquired into or reviewed on application for a writ of habeas corpus." (5)

144. MILITARY DISTRICT PROCLAMATION. Where a certain portion of the state is in insurrection, as indicated in section one hundred and thirty-three, a proclamation may be issued after the military force is on the ground, from the military headquarters of the district. A form for such a proclamation is submitted:

HEADQUARTERS.

County Military District

(5) In re Boyle (Sup. Ct. Idaho, 1899), 57 Pac., 706.

PROCLAMATIONS.

_____, Ohio, February 11, 1906.

1. This county is now in possession of the military forces of the State of Ohio, who have come to restore peace and order and to enforce the laws of the State, under authority and by command of the governor. The colonel commanding said military forces therefore makes known and proclaims the objects and purposes of the State in thus taking possession of the _____ county military district, and the rules and regulations by which the laws of the United States and the State of Ohio will be for the present, and during a state of insurrection, maintained; for the guidance of all good citizens, as well as others who may have been in insurrection against its authority.

2. There exists in (here state conditions showing insurrection). The Military District Commander, therefore, will cause the county to be governed, until the restoration of civil authority and his further orders, by military authority. This measure is deemed necessary because of the facts previously recited, and other facts.

3. (Provision for surrender of arms, see section 134).

4. The persons and property of all well disposed citizens will be protected and safeguards will be furnished wherever necessary and possible.

5. All persons who have heretofore engaged in

PROCLAMATIONS.

or supported the insurrection, or given the insurgents aid and comfort, who shall return to peaceful occupations and preserve quiet and order, holding no further communications of any kind with a lawless person or persons, will not be disturbed in person or property by the military forces except where the exigencies of the public service may render it necessary. All rights of property of whatever kind will be held inviolate, subject to law. All persons in the district are required to pursue their usual vocations. All shops and places of business (except those hereinafter mentioned) are to be kept open in the usual manner, as in times of peace.

6. All saloons and places where intoxicating liquors are sold at retail as a beverage will be closed and kept closed until further order.

7. Violations of state and federal law, disorders and disturbances of the peace, and interferences with the military forces, will be referred to a proper authority for trial and punishment. Misdemeanors will be subject to the civil authority, if it chooses to act. Civil causes will await the ordinary tribunals.

8. No publication, either by newspaper, pamphlet or handbill, reflecting in any way upon the United States, or the State of Ohio, or their officers, or tending to influence the public mind against them, will be tolerated. Comments upon the action of the

PROCLAMATIONS.

military forces, or of the insurgents, will not be permitted.

9. All good citizens will render aid in restoring civil government, etc.

10. All assemblages of persons in streets or highways, either by day or night, tend to disorder, and are forbidden.

11. Vagrancy will not be tolerated.

12. It is hoped that martial law, hereby established, will be mild and gentle in its enforcement; but it will be vigorously exercised when occasion demands.

By order of

.....

.....

.....

.....

Adjutant of the District.

The foregoing outline is partly taken from a recent Colorado proclamation. (6) Some of the suggestions are of value only where no co-operation of the civil authorities can be relied on.

145. SHERIFF'S PROCLAMATION. In the United States there is probably no statute of which the ancient English riot act is an exact prototype. It pro-

(6) Biennial Report Adjutant General of Colorado, 1903-4, p. 114, 115.

PROCLAMATIONS.

vided that a riotous assembling of twelve persons or more, not dispersing upon proclamation, constitutes high treason under a statute of Edward the VI. This statute was many times changed by the English parliament, but it generally provided for a proclamation by a justice of the peace, sheriff, under sheriff, or major. (7)

The purpose of "reading the riot act" was to compel the members of the mob to disperse or declare themselves rioters by persisting in riotous acts after the proclamation was read.

A sheriff's proclamation of the present day may follow the old English practice which consisted in reading the statutory proclamation commanding the assembled mob to disperse. Such a proclamation should follow the statutory provisions, relative to riot, of the state in which it is read. The laws of many states require the Riot Act to be read to a mob before overt proceedings against it. (8)

146. SPECIAL PROCLAMATIONS. When troops are acting in the aid of civil authorities all proclamations will be issued by the civil authorities.

Where martial law has been established, special proclamations may be issued by the governor or by the commander of a military district. All special

(7) 4 Bl. Com., 143.

(8) Davis Mil. Law, p. 327, note; but see Secs. 122, 140.

PROCLAMATIONS.

proclamations are supplemental to the first general one and may refer to it or repeal part of it.

Special proclamations may be necessary from time to time and are often advisable in directing the restoration of peace and order. They may be used for any purpose which requires the publication of a general notice to civilians: such as defining certain offenses, reinstating civil courts and civil officers, etc.

147. **FORFEITURE OF ESTATE.** Under the old English common law there were many instances where crimes caused forfeitures of the estates of the offenders. Most law writers in this country disclaim any such liability at the present day; but there is a roundabout method of forfeiture in some of the states at the present time. To illustrate: there are statutes which permit persons whose property is destroyed by a mob to recover from the county or city in which the civil government was lax enough to permit the destruction. There are other statutes which provide for a similar recovery when a prisoner is injured or killed by the direct attack of a mob. In most of these statutes the county or municipality which pays these damages may recover against any of the parties composing such mob. Therefore, by this circuitous method, a person may pay a heavy penalty because of his presence with a mob which does violence to persons or property.

PROCLAMATIONS.

It follows therefore that, in those states where such liability exists, where a mob is partly composed of persons of property, a proclamation warning them of their liability may sometimes prove efficacious.

148. FINAL PROCLAMATION. When the necessity for martial law no longer exists, a proclamation by the governor or military district commander may be issued stating that the conditions theretofore existing have changed, that peace and good order are restored and that the civil authorities are able and willing to control the situation, perform their legal functions and enforce the law. With these premises this final proclamation might conclude with the statement that further application of military authority, under the general martial law proclamation, is suspended and that the troops still in service will thereafter act in support of, and in subordination to, the legally constituted civil authorities of the district; and that certain troops will remain on duty, to enable the civil authorities to enforce obedience to law and to protect life and property, until further orders. Such proclamation should conclude by a statement of the exact time upon which it becomes operative.

CHAPTER THIRTEEN.

CLOSING SALOONS. ORDER AT NIGHT.

149. STATUTES RELATIVE TO CLOSING SALOONS. In some states there are statutes requiring the mayor of a municipal corporation wherein a tumult or riot, or apprehension thereof, exists, to issue a proclamation requiring the keepers of all saloons, or places where intoxicating liquors are sold at retail as a beverage, to close such places of business and keep the same closed until further orders. The enactment of such a statute is a part of the police power of a state, and the provisions of the statute should be faithfully complied with by civil authorities during domestic disturbances.

150. WHERE NO STATUTES EXIST, and troops are acting in aid of civil authorities, such authorities may use discretion as to closing saloons. It seems to be almost a general rule that saloons are required, by law, to be kept closed on election days. This rule arose from the fact that many election day riots traced their rise to overindulgence in intoxicants by the participants. The statutes just referred to are not the only instance where our governments have recognized the fact that certain classes of a community are sufficiently erratic with-

out the use of stimulants. The statutes prohibiting the sale of liquors to Indians are another instance. It is probably a psychological fact that men who easily lose their self control are, under stress of excitement, apt to resort to stimulants which further increase their mental disorders. It therefore follows that, where sedatives are needed, stimulants might well be prohibited.

151. **MILITARY COMMANDER'S DUTIES.** In acting in aid of civil authorities a military commander cannot enforce statutes unless ordered to do so by the civil authorities. In this kind of duty, the military commander has no power to issue a proclamation closing saloons. Such proclamation must be issued by the civil authorities, unless the governor specifically directs the military commander to act independently of civil authorities.

152. **UNDER MARTIAL LAW** a military commander may often have full discretion as to police powers. Under these he may close saloons or place them under certain regulations.

But where the statute directs the civil authorities to close saloons during a riot, the military commander, who is exercising martial law powers, should enforce this statute. Where no such statute exists a military commander may, in his discretion, permit saloons to remain open under strict regulations. If they are to remain open a part of the

time it is preferable to permit them to do business in the mornings and close them promptly at noon. The reason for this is that civilians, after a day of excitement, seem more prone to resort to violence in the evenings than at any other time. Furthermore, if they have any physical need for stimulants, this need can certainly be supplied during a few hours in the morning and General Miner's rule that: "One drink a day is enough for anybody," seems to be founded on pure reason and sound common sense.

153. PUBLIC MEETINGS AT NIGHT, are a fruitful source of tumult. The members of any assembly may be swayed by oratory or an appeal to the passions of certain elements in the crowd. Most of the great riots have been started at public meetings where orators of anarchistic proclivities have been allowed to hold forth. During a riot a so-called indignation meeting of citizens has sometimes been organized and is nearly always productive of more or less mischief. These meetings should not be allowed to take place.

154. THEATERS AND PLACES OF AMUSEMENT will, under ordinary conditions, be permitted to do their usual business. But, if necessary, the managers of these places may be instructed that no sentiments, antagonistic to the restoration of peace and order, should be engendered in any way or by any

CLOSING SALOONS, &C.

means. If this mild degree of censorship is resisted then more drastic measures could be adopted. If necessary the places could be closed.

155. **MINISTERS.** Ordinarily ministers of the gospel do great good in quelling disturbances. There are rare instances, however, where certain ministers so far forget their proper functions as to create dangerous public sentiment and instigate factional strife by unguarded utterances from the pulpit. Where martial law is, in any degree, being exercised, it may be the duty of the proper officer, either civil or military, to mildly indicate to the offending parson that it is his business to save souls and not to interfere with governmental functions at a time when others are prohibited from such interference. A minister of the gospel has no more right to increase disorders than has any other civilian. All insurgents should look alike to a commander exercising martial law.

156. **CURFEW.** It will occasionally be necessary for civil authorities or military commanders to issue orders requiring all inhabitants to remain in their homes after a certain hour in the evening unless abroad with a permit. Such an order, in the larger towns and cities, necessarily interferes with the rights of the citizens to assemble at clubs, social gatherings and innocent places of amusement; unless the hour for clearing the streets is placed late

enough to permit attendance at these places. In almost all cases where troops are acting in the restoration of peace and order, it is probably proper to keep the streets cleared between the hours of 11 P. M. and 5 A. M. During the extreme stages of a riot or insurrection this time, for a few days, might be extended to include the entire night season. But in every instance it would be the duty of the civil officer or military commander to issue permits to law-abiding citizens whose business required them to be abroad at prohibited times.

157. MAINTAINING ORDER AT NIGHT. When it has become generally known that civilians are prohibited from being abroad, during certain night hours, without a permit, all persons found abroad without permits should invariably be arrested, taken to guard headquarters and there examined. In this examination it will develop that some of the arrested persons are really ignorant of the rule. In these cases ignorance of the law should be an excuse.

Traveling men and others visiting the city on business ought to be given the best treatment that the circumstances permit and should, generally, be permitted to travel from trains to hotels with the fewest possible restrictions. Instructions to hotel managers and railway agents may insure their co-operation and result in arrangements that will be satisfactory.

CHAPTER FOURTEEN.

FIRST DISPOSITION OF TROOPS.

158. **MARCHING THROUGH CITY STREETS.** The necessity for detrainning at proper distances from the mob has been spoken of in section eighty-two. In many instances it will be necessary for the commanding officer, under orders of civil authorities, or the governor, to march his troops to the scene of disorder through a section of a town or city where rioters or insurgents may be attempting to impede the progress of the troops. The street column formation may be used advantageously, but there is always danger of shots or missiles from the roofs of buildings where miscreants, of the bushwhacker type, have stationed themselves. To resist attacks of this nature an advance guard may be employed. It could consist of eight or more picked men with an officer; a civil officer, probably the sheriff, accompanying the commander of the advance guard, except where troops act independently. If the advance guard consists of eight enlisted men, four should march in single file on the sidewalk of each side of the street, with a distance of from six to twenty feet between the men. The officer and

DISPOSITION OF TROOPS.

sheriff may proceed in the middle of the street on line with the two rear men. The first right hand man will look down area ways, into stairways, and other places of concealment on his side of the street. The other three right hand men will minutely examine the house tops on the opposite side of the street. The four left hand men will perform similar duties, the first looking into halls and dark entries and the other three watching the house tops on the right side of the street. Members of this advance guard should have orders to fire in time to prevent the injury, or death from ambush, of the sheriff or any member of the military force. When the proximity of a mob causes the advance guard to close in on the main body, the men who composed it can still perform the special duty of watching house tops, etc. A rear guard may be similarly formed and employed.

During this kind of a march flanking parties, on parallel streets or alleys, may be used.

159. MARCHING ON MOB. When the mob is first encountered, unnecessary hesitation of the troops will have a bad effect. Things must be done sternly and promptly. An order to disperse, before making an attack, is necessary, when civil authorities are in control, except where the mob is in the actual perpetration of a felony when first encountered. Under some circumstances it may be advis-

DISPOSITION OF TROOPS.

able to give the members of the mob two or three minutes in which to disperse. Ordinarily the troops will be deployed in strong lines or columns the full width of the street before the mob is encountered. These lines may be so arranged that they can be successively turned so as to force the mob down the various highways which lead from the place of assembly. A bayonet charge will be used unless members of the mob actually open fire upon the troops. There are instances where the men can advance at port arms and the butt end of a musket can be swung forward when occasion demands. This blow is similar to the old "Butt to front," and can, with practice, be made to resemble the kick of a mule.

160. PREVENTING A LYNCHING. Where a mob has obtained possession of a prisoner and its sole purpose seems to be to take the life of the captive, the utmost celerity of troops is demanded. Too much dash cannot be put into such an affair. If there is no occasion to fire the officers with drawn swords may personally aid in the rush for rescue. At such a time the control of the troops must not be forgotten and the best method to secure this is to divide them into an attacking force, a support and a reserve, each in control of an experienced officer. The attacking force will rally round the prisoner, if rescued. The support will drive away the mob. While the attacking force is being reformed, the

DISPOSITION OF TROOPS.

reserve will see to the safety of the whole force. Prisoners should be taken as indicated in the next section.

161. PREVENTING DESTRUCTION OF PUBLIC PROPERTY. This is best done by sweeping the immediate vicinity clear of all civilians except firemen and officers who are acting lawfully. If the buildings have been fired no civilian will be permitted to approach the lines of hose and the fire will be fought as well as circumstances permit. The military and civil officers may at once take as many prisoners as possible and institute a rigid examination to determine the responsibility for property that may have been damaged. One method of conducting this examination is indicated in section seventy-seven. All members of the mob will probably be equally liable, but the examination may be conducted to fix the material facts, names of members of the mob and the proper criminal procedures.

162. SAFEGUARDS. Strictly speaking, a safeguard is a warrant of security given by an army commander to certain civilians within his jurisdiction. It often happens during a riot that the animus of the mob is directed against some person or persons, and these are in greater danger than other civilians. On such occasions either a civil authority or the military commander furnishes a guard for the habitations or places of business of these men-

DISPOSITION OF TROOPS.

aced persons. This guard, properly speaking, is a safeguard. Under the Articles of War the penalty of death can be administered to a soldier who forces a safeguard during rebellion. (1) Where there is serious danger in allowing members of a mob or other persons to approach one of these protected buildings, a dead line may be established inside of which no one may trespass.

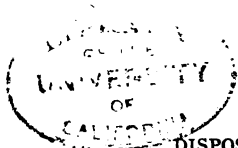
During a riot in Pennsylvania, a guard was placed at a house which had been attacked with dynamite. Orders were, if any attempt was made on the house, or any persons approached the house and failed to halt when directed, to shoot, and shoot to kill. One of the sentries, near midnight, discovered a man approaching the house, and called upon him four times to halt; the man disobeyed the order and the sentry shot and killed him. Held by the supreme court that these facts did not make a prima facie case for holding the soldier in arrest by civil authorities. (2)

Under the last army field regulations, safeguards are not specifically provided for by that name. (3)

(1) 57th Art. of War.

(2) Com. v. Shortall, 206 Pa. St., 165. But it should be also noted that the troops, with whom this soldier acted, were acting independently of the minor civil authorities by the specific order of the governor which is shown in full at Sec. 211.

(3) See pars. 637, 708, 750 and 777 Field Ser. Reg., 1905.



DISPOSITION OF TROOPS.

But there is undoubted necessity for their use in insurrections. The old field regulations contained the following definition, form and direction:

"Safeguards are written protections granted to persons or property, by the commanding general of an army in the field. They are usually given to protect hospitals, museums, establishments of religion, charity, or education, mills, post-offices, and other institutions of public benefit; also to individuals whom it may be to the interest of the army to respect.

FORM OF A SAFEGUARD.

By order of _____.

A safeguard is hereby granted to

.....
(A B..... stating precisely the place,
nature, and description of the persons, property,
or buildings).

All officers and soldiers belonging to the army of the United States are therefore commanded to respect this safeguard, and to afford, if necessary, protection to

.....
(person, family, or property of
as the case may be).

Given at headquarters of the
day of

A. B.

Major-General Commanding-in-Chief.

C. D.,

Assistant Adjutant-General.

DISPOSITION OF TROOPS.

The Act of February 13, 1862, will be printed or written across the face of the safeguard. Safeguards will be numbered and registered." (4)

Instead of the act mentioned, the reverse side could bear the 57th Article of War and extracts from orders concerning violations of safeguard by civilians.

163. **BARRICADES.** In protecting public buildings barricades are often used to stop rushes. Where feasible these should be constructed as soon as possible. Unless the buildings stand in an open space barricades will be thrown across adjacent streets. Where a building, standing in a large open space, is to be guarded, it is advantageous to use two or more strands of barbed wire just outside the line of guards. This will impede a rush and it has a peculiar moral effect in helping to dispel the lonesome feeling which the sentries experience. Street barriers are constructed of any and all convenient material. Wagons, barrels of salt and heavy articles make the most substantial structures. Wire entanglements are sometimes used in front of barriers. A smaller guard is needed when barriers are used.

164. **MACHINE GUNS** are of great value in guarding property. Their moral effect is often

(4) Pars. 76 and 77, Troops in Campaign, W. D., 1892.

DISPOSITION OF TROOPS.

added to by circulating reports as to their extreme destructiveness. For defending buildings and property the location of the gun should be changed at nightfall and daylight. Where no barriers are constructed, each gun crew should station sentries about two hundred feet in front of the gun and allow no assembling of persons within that distance.

165. CAVALRY. Unless the horses are well trained, mounted men cannot safely be used against a mob in the first stages of a riot. After control of the mob has been gained, cavalry may be employed as patrols and thereby save the infantry a great deal of fatiguing work. (5)

European cavalry, with its thoroughly trained horses, is often used, in riot duty, before any other arm. Its moral effect is decidedly good and its physical effect may be so controlled that no harm is done to citizens who are not members of the mob. Well-trained cavalry, properly led, may avoid the danger consequent on using modern rifles.

166. ARTILLERY will usually be held in reserve at the inception of riot duty. But if rioters or insurgents are barricaded, artillery is extremely valuable in destroying a barricade or causing the dispersal of those behind it. Militia artillery is usually brought into action by men on the prolongs, as un-

(5) See Sec. 23.

DISPOSITION OF TROOPS.

trained horses are useless except for marches or transportation.

167. MEDICAL DEPARTMENT details will accompany the troops in order to be ready for demands that may be made for their services. The senior officer will take stock of stores and appliances on the ground and ask the assistance of other staff officers in supplying deficiencies.

168. GENERAL SUGGESTIONS. The proper performance of riot duty requires the adoption of, and adherence to, general plans which are tests of the officers ability. An ambitious officer may, by decisive action and proper disposition of troops, acquire fame. A notable instance of this fact appears in the history of Napoleon. During the republic 40,000 insurgents prepared to attack the convention. Its members were greatly alarmed at their danger. One of them proposed to intrust the defense to: "A little Corsican officer who will not stand upon ceremony!" Napoleon, under this introduction, was chosen. His defense was thorough and effective, although it caused many casualties. Before this event he was unknown; because of it he was given command of the army of Italy. One tour of riot duty made Napoleon famous and put him in a position to become the greatest general of any age.

Temporizing with a mob is usually an exhibition of poor judgment. It not only indicates weakness,

DISPOSITION OF TROOPS.

but is injurious to the discipline of the troops. A vacillating commander cannot command obedience from his own force. How can he expect to control a mob?

It must be borne in mind, in formulating plans, that the procedure is absolutely dependent on the commander's orders. He must first determine whether he is to act in aid of civil authorities, in part independently of civil authorities, or independently of every one except the governor, or the president when he sees fit to act.

CHAPTER FIFTEEN.

SUBSISTING, QUARTERING AND PAYING TROOPS.

169. SUBSISTING TROOPS IN FEDERAL SERVICE. Subsistence is ordinarily furnished, and arranged for, through the subsistence department, under regulations prepared by authority of the secretary of war. Paragraph three of the Manual for Subsistence Department reads as follows:

“The supply of the Army, and the direction of the expenditures of the appropriations for its support, are by law intrusted to the Secretary of War. He exercises control through the bureaus of the War Department. He determines where and how particular supplies shall be purchased, delivered, inspected, stored, and distributed. A. R., 821. Vide Rev. Stats., 216, 217, 219, 220.”

Under the statutes referred to by this paragraph there are two ways of subsisting a federal force:

First. By requisition and ration return, under the regulations, to the United States commissaries, on prescribed forms, following the method used by the regular army.

SUBSISTING TROOPS.

Second. Under sudden emergencies where volunteers or militia are mustered into service by the federal government for riot duty in another state, or to repel invasion, the secretary of war may, under authority of the statutes above referred to, authorize certain officers to dispense with ordinary formalities and make contracts which will insure the procurement of necessities for the troops, until the regular machinery of the commissary department has been sufficiently supplemented to take care of the new force. The officers so authorized should be officers of the subsistence department to comply with paragraph seven hundred and thirty-three of the manual for that department which reads as follows:

“It shall be the duty of the officers of the Subsistence Department, under the direction of the Secretary of War, to purchase and issue to the Army such supplies as enter into the composition of the ration. Rev. Stats. 1141.”

It would seem that no officer below the secretary of war could authorize these emergency contracts to be made in other than the regular way.

170. **FEDERAL SERVICE—EMERGENCY SUBSISTENCE.** Where the commander of a force, hastily mustered into the federal service, has received authority to obtain emergency subsistence, his staff

SUBSISTING TROOPS.

officers should conduct all such business with system and as nearly under the regulations of the subsistence department as possible. This will enable these acting commissaries to turn over the business to the regular subsistence department without embarrassing delays.

In order that the commissaries' good faith may be shown, as well as known, no stores should be purchased without securing written proposals from available sources. These proposals will be filed and turned over with the officers' papers. If the commissaries of state troops have taken the precautions suggested in section eighty-nine, they will be qualified to enter upon their federal duties on sudden emergencies.

171. STATE STATUTES AND REGULATIONS govern subsistence issues in state service, where time permits of their being followed, but, as has been said before, time is often of the utmost importance in riot duty, and the men must be fed or their fighting ability is at least cut in half and their discipline is almost destroyed. Nearly all state regulations governing subsistence of troops have been made by command of the governor. Wherever he is the source from which these regulations flow, he is also the source from which they may be set aside or amended. Therefore, whenever the governor, advised by his adjutant general, has reason to appre-

SUBSISTING TROOPS.

hend that the subsistence machinery of his troops cannot be put in working order, concurrently with the execution of an order for state duty, he should, by a few words added to this order, permit the commanding officer to make such arrangements for subsistence as will least interfere with the performance of the duty required. Under such arrangements meals may be served in restaurants by contracts with proprietors, or any plan suited to the emergency may be lawfully adopted.

172. EMERGENCY SUBSISTENCE WITHOUT ORDERS. Where state troops are suddenly ordered into state service and no provision in the order is made for subsistence, the commanding officer has probably the incidental power to contract, through his staff officer, in the name of the state, for whatever necessities his troops require. But under these circumstances an inquiry may afterwards arise, because such commanding officer did not follow the state regulations for procuring subsistence. He should therefore be prepared to show that the emergency contracts were necessary and also that he established the regular commissary system as soon as the other duties of the troops permitted him to do so.

173. BILLETING TROOPS without consent of the owners of the property is prohibited. But this provision does not prevent quartering the troops in public buildings nor in private buildings by con-

SUBSISTING TROOPS.

tract with the owners. Assembly halls, vacant business blocks and other large buildings with large rooms are the best means of quartering troops, because they permit of sleeping a company or more in each room and the property for which the company commander is responsible can be more readily guarded. (1)

174. CANVAS. Where the weather is sufficiently propitious regular camps are established as soon as possible. In doing this, where the service is likely to continue some days, the quartermaster may erect all the canvas obtainable, whether needed or not. It is safe to assume that the rioters will, if they continue to resist the troops, try to ascertain the number of men in the command; and a few more tents on each street may make a difference in their calculations.

175. QUARTERMASTER'S DUTIES are either prescribed by the state regulations or are very fully indicated by the quartermaster's manual, referred to in section eighty-nine. During the exercise of martial law, under orders of the governor, the quartermaster may be given any additional authority that is necessary. Under some circumstances these martial law powers may be very extensive. They are indicated in chapters seventeen and nineteen.

176. OFFICER'S SERVANTS. Every mounted of-

(1) See par. 600, Field Ser. Reg., 1905.

SUBSISTING TROOPS.

ficer has occasion to use a servant. In state service some regulations permit of the subsistence and quartering of one civilian servant of each mounted officer at state expense. Where no such regulations give the officer authority to feed and quarter a servant with the troops, it is a wise provision to make such an order in a campaign of any length. To require a mounted officer to act as groom, stable guard, herdsman, and horse-holder is absolutely incompatible with the performance of his more important duties. The time an officer is daily required to use in caring for his horse, horse-equipment and luggage is of far more value to the government than one ration and part of a tent. The customary use of strikers, from the enlisted men, might be avoided by subsisting these civilian servants. For obvious reasons the term equery might be used instead of the word servant, in orders relating to civilian assistants to mounted officers.

177. PAYING TROOPS. This is a matter of almost wholly statutory regulation. The executive department of the government does the work and the law-making body pays the bills—or ought to. There are statutory provisions in most states under which a so-called deficiency board, acting usually with the governor, can take care of unusual payments between sessions of the legislature. It is the duty of the governor, whenever the law permits,

SUBSISTING TROOPS.

to invoke the aid of this board in paying state troops for riot duty. While many of the men perform their duty without regard to pay, they are nevertheless entitled to proper recognition for their services, and are quick to resent any act of bad faith with regard to their meager allowances by the state. In times of peace it costs the state almost nothing to keep this reserve force in a fair state of efficiency. This efficiency is maintained in order that these comparatively few men may perform the military services for which nearly all able-bodied men in the state are liable. To destroy this force by injustice or indifference is not fulfilling the duty which the civil officers of the state are sworn to perform.

CHAPTER SIXTEEN.

TACTICAL USE OF TROOPS.

178. IN FEDERAL SERVICE. The army regulations usually contain a few paragraphs on this subject. These have been slightly changed in successive editions. (1)

The difference between the action of federal troops, and the action of state troops in aid of civil authorities, seems to be that federal troops cannot act under the orders of any civil officer. This difference in control does not legally relieve the federal troops from responsibility for their actions; but federal troops are often harder to find on conclusion of riot duty than are the men who composed the state troops. It is therefore a fact that federal troops run less risk in the stern and effective performance of riot duty, than do the state troops; because, while the law that governs them is the same, (with the important exception just named) its application is more difficult with regard to members of the federal force. This is true because, on conclusion of the duty, the troops are usually removed from the state before the process of the state

(1) See paragraphs 487-488 A. R., 1904; A. R., 1895 par., 490, etc.

TACTICAL USE OF TROOPS.

courts can be served upon officers or men. (2) They are nevertheless liable under both military and civil law for acts of non-feasance and malfeasance and, by departing from the state, have only secured a change of venue for suits or actions which are instituted or charges that are filed. Wherever the passions of men have been roused to such an extent that the savage in their nature has been uppermost for a time, a change of venue may be legally due to any person whose acts may have been misconstrued because of this passion. It therefore follows that the federal troops are often entitled to just the change of venue which they secure. It gives the minds of men time to cool. It permits the citizen's better nature to overcome his savage instincts and he views the action of the troops from a different standpoint. He has had time to reflect that, while a few personal hardships have resulted, civil government has been maintained and he is now living in a state of security as to person and property, instead of being a victim of the anarchy which would have reigned without federal intervention.

Furthermore, federal troops have less difficulty in ascertaining and keeping informed of their legal status; because they are acting independently of civil authorities and are required only to consult

(2) See Tarble's Case, 13 Wallace, 397; Secs. 90, 91, 92; Sec. 228.

TACTICAL USE OF TROOPS.

their orders as to co-operation with state forces, both military and civil.

It follows, from the foregoing reasons, that the tactical use of federal troops should be no more drastic than that of state troops; but that the use of federal troops is not hampered by the necessity of consulting or taking orders from the civil authorities. In other words, many of the rules stated in chapter nine, relative to the conduct of troops in aid of civil authorities, do not apply to federal troops. By federal troops is meant both regulars and militia in federal service. Therefore, in planning for the tactical use of federal troops, a strictly military situation presents itself and the main question is: What force shall be used? This question:

"Will be decided by the immediate commander of the troops, according to his judgment of the situation." (3)

Federal regulations also prescribe that:

"The fire of troops should be withheld until timely warning has been given to the innocent who may be mingled with the mob. Troops must never fire into a crowd unless ordered by their commanding officer, except that single selected sharp-shooters may shoot down individual rioters who have fired upon or thrown

(3) Par. 488 A. R., 1904.

TACTICAL USE OF TROOPS.

missiles at the troops. As a general rule the bayonet alone should be used against mixed crowds in the first stages of a revolt. But as soon as sufficient warning has been given to enable the innocent to separate themselves from the guilty, the action of the troops should be governed solely by the tactical considerations involved in the duty they are order to perform." (4)

This indicates that an order to disperse must be given, which is in addition to the president's proclamation referred to in section forty-two. The regulations further provide that the commanding officer is governed by the general regulations of the army and shall apply military tactics in carrying out his orders. It is, moreover, considered that:

"It is purely a tactical question in what manner they shall use the weapons with which they are armed—whether by fire of musketry and artillery or by the use of the bayonet and saber, or by both, and at what stage of the operations each or either mode of attack shall be employed. * * They should make their blows so effective as to promptly suppress all resistance to lawful authority, and should stop the de-

(4) Id.

TACTICAL USE OF TROOPS.

struction of life the moment lawless resistance has ceased. Punishment belongs, not to the troops, but to the courts of justice." (5)

The two sentences last quoted are more important than they seem at first glance. Unless destruction of life is stopped as soon as resistance has ceased the subsequent killings are murder. (6) By courts of justice is meant not only the ordinary civil courts, but the military commissions that may be established under martial law. The last quoted sentence means that a vanquished mob is entitled to the benefit of the laws of civilized warfare. It does not, however, prohibit the killing of one who is attempting to escape after the commission of a felony and who cannot be captured by other means. (7)

179. FEDERAL STATUTES necessarily control any regulations or orders with relation to the tactical use of federal troops under article four, section four of the constitution of the Union. One of the most important of these, which has been heretofore referred to, contains the provision that:

"It shall not be lawful to employ any part of the army of the United States,

(5) Id.

(6) Hare's Am. Const. Law, 922; Sec. 112.

(7) See Sec. 101.

TACTICAL USE OF TROOPS.

as a posse comitatus, or otherwise, for the purpose of executing the laws, except in such cases and under such circumstances as such employment of said force may be expressly authorized by the Constitution or by act of Congress." (8)

Very few of the federal statutes, however, attempt to regulate the tactical use of troops. The statutes applying to federal aid leave the regulation of troops in the hands of the president. Other statutes use substantially this form:

"The military forces of the United States may be applied in such manner and under such regulations as the President may direct." (9)

180. STATE STATUTES, relative to tactical employment of troops, regulate state troops in state service, if they have been enacted under proper constitutional provision. A discussion of all of these statutes is beyond the scope of this work. Many important ones are indicated in chapter nine. (10)

181. TACTICS—DEFINITION OF. Before entering the discussion required by the heading of the next section it may be well to set forth the definition of the word tactics. Tactics means the art of

(8) Act of June 18th, 1878, (20 Stat. L., 152.)

(9) Military Laws of the U. S., Davis, 1901 and supplements.

(10) See Sec. 116.

TACTICAL USE OF TROOPS.

handling troops in the presence of the enemy. Therefore whenever rioters or a mob may be considered enemies, and the troops are at the place of disturbance, the handling of the troops constitutes tactics. The strategical use of troops terminated upon their arrival at the scene of disorder.

182. STATE REGULATIONS are published in most states whereby the state militia are directed, generally, in the tactical employment of troops on riot duty. But these regulations are not always in conformity to the state statutes which authorize a minor civil authority to use troops. They are sometimes loosely drawn and therefore occasionally prove pernicious. There are instances where these state regulations have copied the army regulations without recognizing the difference between the state and federal forces, i. e., that state forces may be controlled by civil authorities and federal troops always act independently.

The state regulations should provide for two kinds of tactics, namely:

1. Tactics in Aid of Civil Authorities.
2. Tactics under Qualified, Co-operative and Absolute Martial Law.

There is very little difference in the tactical use of troops under the different degrees of martial law, for in all instances the orders come from the presi-

dent or governor, give the commanding officer discretionary powers and indicate the scope of the work and degree of force.

Tactics in aid of civil authorities are necessarily restricted by the control which a sheriff, mayor or other civil officer, exercises over the military officer.

Therefore a state tactical regulation, following the federal plan and requiring independent action of troops, is, as to some occasions, revoked by the governor's command to a military officer to: "Report to the sheriff of county in aid of the civil authorities."

183. TACTICS IN AID OF CIVIL AUTHORITIES must be determined by the orders which the military commander receives from the civil authorities. This may be stated as a general rule with relation to the offensive measures that are to be taken. But the general rule has several qualifications:

1. A minor civil officer may only direct troops when the governor has ordered the troops to report to him for orders or when this same civil officer has directly called out the troops. (11)

(11) This call must be under statutes indicated in Secs. 55 and 56. A sheriff or magistrate can not delegate his authority to a military force which he summons to his aid or vest in military authorities any discretionary powers to take any step or do any act to prevent or suppress a mob or riot. *State v. Coit*, 8 O. Dec., 62.

TACTICAL USE OF TROOPS.

a. A minor civil authority, under conditions just recited, may tell the troops what to do, but not how to do it. The regulation tactical employment of troops may be resorted to in carrying out this order.

b. If the governor orders certain things to be done, the minor civil authorities may not interfere. The regulation tactical employment of troops may be resorted to in carrying out the governor's order.

c. The control by civil authorities can never prevent the troops acting in self-defense. They may always use force enough to successfully repel a physical attack by a mob or rioter. The regulation tactical employment of troops may be resorted to in self-defense.

No more than necessary force may be used in each instance. The specific rules are stated in chapter nine.

184. TACTICS UNDER QUALIFIED MARTIAL LAW. This is practically the same condition stated in paragraph *b* of the last preceding section.

185. TACTICS UNDER CO-OPERATIVE MARTIAL LAW. The federal regulations stated in section one hundred and seventy-eight may be here followed, giving due consideration to those civil authorities who are still properly performing their functions. The degree of co-operation may be indicated in the

TACTICAL USE OF TROOPS.

order for service. Specific situations are indicated in chapter ten, and hereafter in this chapter.

186. TACTICS UNDER ABSOLUTE MARTIAL LAW. The federal regulations stated in section one hundred and seventy-eight here apply without qualification. Specific rules are stated in chapters eleven, seventeen, eighteen and nineteen.

187. USE OF BAYONET. When the mob is to be dispersed, and rifle fire is not necessary, the bayonet may be resorted to without hesitation. The only qualification is that an order to disperse should, where the mob is not engaged in a felony which prohibits waste of time, be first given. Winthrop, with relation to energetic actions against the mob, makes the following statements:

“On the occasion of the Railway Strike of July, 1894, a blow with the sword administered to a leader of the obstructionists at Livingston, Montana, inflicting a slight wound, by the captain commanding the detachment of United States troops, contributed most materially in putting an end to the existing formidable obstruction and opening the Northern Pacific Railroad to the transportation of the United States mails and the free transit of passengers.

‘It is better to anticipate more danger-

TACTICAL USE OF TROOPS.

ous results by energetic intervention at the inception of a threatened breach of the peace, than by delay to permit the tumult to acquire such strength as to demand for its suppression those urgent measures which should be reserved for great extremities.'” (12)

188. USE OF BLANK CARTRIDGES seems to be generally condemned. Some state statutes expressly forbid their use in riot duty. It is plain that if mobs are taught to expect rifle fire to be harmless, the moral effect of it is not only lost but, when ball cartridges are finally used, the rioters nurse an additional hate; reasoning that they have been betrayed.

189. SAFEGUARDS AND OUTPOSTS. Where troops are acting independently of civil authorities the Cossack post may be used for safeguards, with orders similar to those set out in section one hundred and sixty-two. Outposts, where necessary, are more easily handled under the Cossack post plan than the European plan of reserve, supports, pickets and sentries. The reason why Americans take so naturally to the Cossack post system of outposts is because it is really an American system under an alias. It bears the same relation to the European

(12) Winthrop's Mil. Law and Prec., p. 1351; 2 Wharton, Criminal Law, Sec. 1555.

TACTICAL USE OF TROOPS.

system as does the modern code pleading to one of the eighteenth century.

190. GUARDING LARGE AREAS. Where a number of city blocks are to be guarded at night, a resort is sometimes had to picket posts and sentries. If these sentries are in danger of assassination or injury two men should occupy each post, even if the number of posts must be lessened. A lone sentry, at the corner of two alleys at night, is a temptation to the vicious. His attention may be attracted and engaged by one rioter while he is quietly sand-bagged from behind by another.

In preserving quiet in a city large scaled maps may be used in blocking off districts. If cavalry is not available for patrols, a reserve is often established and furnished with patrol wagons which carry squads to any point where disorder exists.

CHAPTER SEVENTEEN.

MARTIAL LAW.

191. DEFINITION. In section three, martial law is spoken of as the law enforced by a military commander over civilians in a certain district at certain times. The term martial law means the rule of the military as distinguished from that of the civil authorities; but law writers have commonly avoided the duty of concisely defining the meaning of the "law" part of the term "martial law." As a matter of fact the meaning varies with the degree of militarism required in its exercise. There are, perhaps, three degrees of martial law, and the reader is necessarily referred to the next three sections for definition; because a definition of the general term fits neither degree. (1)

192. ABSOLUTE MARTIAL LAW. The first degree of martial law is where it is the only law prevalent in a certain district and the will of the military commander is well nigh absolute. His military commissions are the only courts which can be found where rights of civilians may be enforced and their wrongs redressed. This is the highest degree

(1) See Sec. 198.

MARTIAL LAW.

of martial law. All civil courts have absolutely ceased to exercise their functions. The military commander must organize a provisional government for the civilians in the district. He must detail officers, or civilians, to perform the various governmental functions. A military district commander is necessarily, under these circumstances, a dictator. But, as has been said before, he may be subject to punishment as soon as his reign is over. During his incumbency, however, he is responsible for the good government of his district. Governing the district is a duty which he may not shirk. The laws he should enforce are:

First. The civil laws wherever adequate and applicable.

Second. The written laws which he will from time to time publish in the form of proclamations or orders.

Third. The customs of war in like cases.

Each law, so applied, would be a rule of civil conduct, prescribed by competent military authority, commanding certain things as necessary to, or forbidding certain things as inconsistent with, the peace and order of society. (2)

193. CO-OPERATIVE MARTIAL LAW is exercised by federal military officers, under orders therefor. The degree of martial law, less than absolute, which

(2) Robinson's Elementary Law.

MARTIAL LAW.

federal military officers may exercise, can hardly be called qualified martial law, because civil officers cannot interfere with or give orders to federal military officers. (3)

Co-operative martial law may also be applied by state troops in state service wherever certain civil authorities can be induced to properly perform their duties in a military district. On these occasions the military commander will supplement whatever civil law is being enforced with that degree of martial law which is necessary to completely round out the governmental functions.

Under these circumstances the laws are applied by the military commander in the same order as in absolute martial law. But written orders and proclamations of the commander will be so framed as to permit of certain civil officers performing their functions. (4)

194. QUALIFIED MARTIAL LAW is commonly exercised, by order of the governor, where troops are quelling a riot or mob, when the civil authorities are powerless, indifferent or secretly in sympathy with the mob. These troops may be nominally under orders of the local civil authorities or may be acting directly under orders of the gov-

(3) See Sec. 139; Act of Congress of June 18, 1878, (20 Stat. L., 152.)

(4) See Sec. 119.

MARTIAL LAW.

error in preventing a threatened violation of law on an occasion similar to that indicated in section thirty-six.

This degree of martial law also arises where troops have been ordered to aid the civil authorities and have later, by proper order, been compelled to act in opposition to the order of certain authorities. The martial law here exercised may be increased in degree, but is ordinarily confined to one or two acts of arbitrary authority.

Qualified martial law may also be exercised by the military commander in carrying out specific orders of the civil authorities.

195. CIVIL LAW. Technically this term is still used to denote the Roman law. It is now sometimes used to distinguish those statutory and common law rules of a community which do not relate to crimes and offenses; the latter being called rules of criminal law.

"Civil Law," as the term is used in this work, means the law, both civil and criminal, that ordinarily governs civilians, in contradistinction to martial law and military law.

196. INSURRECTION AND REBELLION. Absolute martial law is exercised in districts or states which are in insurrection or rebellion. These terms have been defined in section thirty-two. Ordinarily an insurrection which requires the exercise

MARTIAL LAW.

of full martial law powers is one brought about by great disturbance and violence. But a harmless and bloodless attempt to overthrow an existing government, or to resist the laws, if made by the united civilians of a certain section of the country, may require the full exercise of martial law. (5)

197. STATUS OF INSURGENTS. In military districts established under absolute martial law, all residents of the district become liable to be treated as enemies until control is gained by the military.

(6) But this legal rule requires qualification in

(5) 22nd Cyc., 1452. Allegheny County v. Gibson, 90 Pa. St., 397, 417, 35 Am. Rep., 670; "If, therefore, it shall appear to you that any person or persons have willfully obstructed or retarded the mails, and that their attempted arrest for such offense has been opposed by such a number of persons as would constitute a general uprising in that particular locality, and as threatens for the time being the civil and political authority, then the fact of an insurrection * * has been established; and he who by speech, writing, or other inducement assists in setting it on foot, or carrying it along, or gives it aid or comfort, is guilty of a violation of law." In re Charge to Grand Jury, 62 Fed., 828.

(6) Ford v. Surgett, 97 U. S. 594-604; Rice v. Shook, 27 Ark., 137, 11 Am. Rep., 783; Knoefel v. Williams, 30 Ind., 1; Turner v. North Carolina R. Co., 63 N. C., 522; Prize Cases, 2 Black (U. S.) 635, 17 L. ed., 459; The Amy Warwick, 1 Fed. Cas. No. 341, 2 Sprague, 123; The D. Sargeant, 7 Fed. Cas.

MARTIAL LAW.

actual practice, and the federal orders therefore prescribe that: -

"The military commander of the legitimate government, in war of rebellion, distinguishes between the loyal citizen in the revolted portion of the country and the disloyal citizen. The disloyal citizens may further be classified into those citizens known to sympathize with the rebellion without positively aiding it; and those who, without taking up arms, give positive aid and comfort to the rebellious enemy without being bodily forced thereto. Common justice and plain expediency require that the military commander protect the manifestly loyal citizens in revolted territories against the hardships of the war as much as the common misfortune of all war admits." (7)

198. ELASTICITY OF MARTIAL LAW. In Bishop on Criminal Law, the author, in discussing the subject of martial law, says:

No. 4,098. "The fact that the number of insurgents in a state is so great that they carry on a civil war against the government does not entitle the government set up by such insurgents to the privileges of sovereignty." U. S. v. Smith, 27 Fed. Cas. No. 16,318; see Sec. 32.

(7) Pars. 815, 816, Field Ser. Reg., 1905.

MARTIAL LAW.

"Martial law is elastic in its nature, and easily adapted to varying circumstances. It may operate to the total suspension or overthrow of the civil authority; or its touch may be light, scarcely felt, or not felt at all, by the mass of the people, while the courts go on in their ordinary course, and the business of the community flows in its accustomed channels." (8)

The supreme court of the United States, on this subject, says:

"Martial law is the law of military necessity in the actual presence of war. It is administered by the general of the army, and is, in fact, his will. Of necessity it is arbitrary, but must, in fact, be obeyed." (9)

199. NECESSITY FOR MARTIAL LAW determines the right to use it. The executive branch of the government must perform its duties. One of these duties is to decide when and in what degree martial law shall be exercised. This decision is not subject to review. The exercise of this right, when necessity therefor seems to arise, is necessary to the very existence of the government. When civil law

(8) Vol. 1, 6th Ed., Sec. 52.

(9) U. S. v. Diekelman, 92 U. S., 520-6.

MARTIAL LAW.

is dead, dormant, or inadequate to an emergency, the government itself may be overthrown unless resort is had to martial law. The old maxim that: "Tyranny is better than anarchy and the worst government is better than none at all," has often been applied to those absolute monarchies which are governed at all times by military force. This old maxim recognizes the fact that the perpetual exercise of worse than martial law is better than a state of anarchy or no government at all. In the states of the American Union the resort to martial law is only made when situations demand its exercise. Under monarchies where military government is perpetual no officer can be called to account, by civil courts, for abuse of his authority. But here, after the temporary exercise of martial law and the restoration of order, the officers who have exercised martial law powers are again amenable to the process of the civil courts and their exercise of martial law powers may be reviewed and proper penalties inflicted.

Therefore, even during the exercise of martial law, there is a vast difference between the situation of our civilians and that of the civilians of most European nations; for there the military power may be abused without a thought for the consequences, while here martial law is exercised under the powerful restraint imposed by the fact that

MARTIAL LAW.

every action of the military commander may, if necessary, be afterward scrutinized by the civil courts.

200. STATE POWERS. Chief Justice Taney, in delivering an opinion of the United States supreme court, said:

“The right of a state to declare martial law and use its military power to put down an armed insurrection, too strong to be controlled by the civil authority, is unquestioned. The power is essential to the existence of every government, essential to the preservation of order and free institutions, and is as necessary to the states of this union as to any other government. The state itself must determine what degree of force the crisis demands.” (10)

It has been heretofore shown that this state power is commonly intrusted to the governor. It is therefore a general rule that all martial law powers, conferred on state troops in state service, come directly from the governor. These powers may be in the form of a direct order to the military commander or may be exercised by him under a general proclamation.

Where a governor issues a general order, calling out the militia to suppress violence and maintain

(10) *Luther v. Borden*, 7 Howard, (U. S.) 45.

MARTIAL LAW.

the public peace in a district affected by a strike, it is a declaration in such district of qualified martial law. (11)

201. **PRESIDENT'S POWERS.** The United States Constitution, having given congress the power to declare war, primarily raised a question as to the power of the president to exercise martial law powers and to suspend the writ of habeas corpus. But the federal laws set forth in section forty-two plainly indicate that the president has been invested by congress with full powers in times of insurrection and domestic disturbance. Under these statutes he may declare almost any prescribed part of the country to be in a state of insurrection, and may thereafter exercise full or co-operative martial law within this district without reference to any other civil authority whatever. (12) These are the discretionary powers which have been vested in him, first by the acts of the states in framing the federal constitution, second by the act of congress in intrusting to him certain of its war powers. With reference to these duties of the president it has been said:

"If he deem the placing any district under martial law a proper measure, it is difficult logically to deny him the right

(11) *Commonwealth v. Shortall*, 55 A. 952, 206 Pa. St., 165.

(12) See Sec. 217.

MARTIAL LAW.

to do it. Someone must judge of the necessity; the determination of some authority must be final. And where, with reason, can be lodged this discretionary power with greater safety than with that branch of the government to which is intrusted the conduct of the war, and which is held responsible for its successful prosecution?" (13)

202. TERRITORIAL GOVERNOR'S POWERS. Governors of the territories of the United States may, by permission of the president, declare martial law within their territories when necessary. This right has heretofore been denied by an attorney general of the United States. (14) But his opinion was afterwards disregarded by a governor of the same territory. (15) This governor was required to make a choice between martial law and anarchy, and when any government is driven to such an extremity the right to enforce martial law has certainly accrued. It is then a time of war.

203. EXERCISE OF ABSOLUTE MARTIAL LAW. In the exercise of absolute martial law the military commander must exercise the functions of every civil officer, or cause these functions to be exercised

(13) Birkhimer, Mil. Gov. & Mar. Law, p. 378.

(14) 8 Opin. of Atty. Gen., p. 365, et seq.

(15) Birkhimer Mil. Gov. & Mar. Law, p. 499.

MARTIAL LAW.

under his direction and control. Proclamations will indicate the will of the commander and his appointments to various positions which must be filled in his provisional government. But those governmental affairs which may be safely postponed should be allowed to remain in *statu quo* until the regular civil government has been re-established. It is impossible to set out, in this volume, all the rules which govern in the administration of absolute martial law, but a few of the most important are shown in the sections next following.

204. PRINCIPAL RULES. a. To save the country is paramount to all other considerations.

b. A place, district, or country declared in insurrection and occupied by troops, is under martial law.

c. The occupation applies only to the territory where military authority is established and in a position to assert itself.

d. The martial law, thus established, does not cease until express proclamation or order restores the civil authorities.

e. Martial law consists in the suspension, by the occupying military authority, of the criminal and civil law, and of the domestic administration and government in the occupied territory, and in the substitution of military rule and force for the same, as well as in the dictation of general laws, as far

MARTIAL LAW.

as military necessity requires this suspension, substitution, or dictation.

f. The military commander may proclaim certain laws. (See section one hundred and ninety-two.)

g. No general penalty, pecuniary or otherwise, can be inflicted on the whole population on account of the acts of individuals, unless the entire population is collectively responsible.

h. No taxes shall be collected except under a written order and on the responsibility of a commander-in-chief. This collection shall only take place, as far as possible, in accordance with the rules in existence and the assessment of taxes in force.

i. Neither requisition in kind nor services can be demanded from civilians except for the necessities of the army of occupation. They must be in proportion to the resources of the country, and demanded only on the authority of the commander in the locality occupied. Receipts must be given in every instance.

j. The commander of an attacking force, before commencing a bombardment, except in the case of an assault, shall give fair warning.

k. Railways, telegraphs, telephones, ships and all kinds of war material may be used for military service, but shall be restored at the conclusion of peace and compensation paid for their use.

MARTIAL LAW.

l. Family honors and rights, individual lives and private property as well as religious convictions and liberty, must be respected. Private property can not be confiscated.

m. Edifices devoted to religion, art, science and charity, especially all hospitals and places where sick and wounded are collected, should be protected. These may be indicated by some particular and visible sign.

n. Pillage is absolutely prohibited even where a town or place is taken by assault.

o. No property will be destroyed or seized unless such destruction or seizure be imperatively demanded by the necessities of war.

p. All personal belongings of prisoners of war, except arms, horses and military papers, shall remain their property. Prisoners must be humanely treated. A prisoner of war is a public enemy armed or attached to the hostile army for active aid, who has fallen into the hands of the captor, either fighting or wounded, on the field or in the hospital, by individual surrender or by capitulation. . (16)

205. RIGHT OF SEARCH. With reference to

(16) See G. O. 100, A. G. O., 1863; Appendix to Mil. Laws, U. S., Davis, 1901; Appendix to Birkhimer, Mil. Gov. & Mar. Law; Hague Conference Code in G. O. 52, A. G. O., 1902; Field Ser. Reg., U. S., 1905; American National Red Cross Act of June 6, 1900, (31 Stat. L. 1900).

MARTIAL LAW.

the Dorr insurrection in Rhode Island (where, by the way, armed collision was only threatened, without an actual conflict of the opposing forces), it was held :

“It was a state of war; and the established government resorted to the rights and usages of war to maintain itself, and to overcome the unlawful opposition. And in that state of things the officers engaged in its military service might lawfully arrest any one who, from the information before them, they had reasonable grounds to believe was engaged in the insurrection, and might order a house to be entered and searched, where there were reasonable grounds for supposing he might be there concealed. Without the power to do this, martial law and the military array of the government would be mere parade, and rather encourage attack than repel it.” (17)

206. JURISDICTION OF CIVIL COURTS. Where war actually prevails the ordinary courts have no jurisdiction over the action of the military authorities, and the mere fact that some of the ordinary courts are open is not sufficient to constitute a time

(17) *Luther v. Borden*, 7 How., 1.

MARTIAL LAW.

of peace, and thereby to exclude the operation of martial law. (18)

207. ADMINISTRATION OF MARTIAL LAW. The formation of martial law courts has been indicated in section one hundred and thirty-six. With reference to their action it may be said that a condition of affairs, warranting the use of martial law, imposes on a military commission the same duty intrusted to civil courts. That duty has been defined to be the punishment of offenders so as to deter others from committing the same offense. Vengeance belongs neither to civil courts nor to military commissions. In restoring peace and government to insurgents, military commissions may take cognizance of any offense which interrupts any detail of the progress of the work of reconstruction. This is done that order may be restored as soon as possible.

In the restoration of order it may be the duty of military commissions to suppress certain publications and to do other things which are not attempted, and are not proper, in time of peace. Punishments are necessarily summary. The deterrent influence is the sooner made to appear.

208. PUNISHMENTS. Punishments will never

(18) (Eng. 1902.) *Marais v. General Officer Commanding the Lines of Communication*, 71 Law J. P. C., 42; App. Cas. 109, 85 Law T., 734, 50 Wkly. Rep., 273.

MARTIAL LAW.

be unnecessarily cruel, but are occasionally unusual. Unusual punishments are sometimes required by stress of circumstances and at other times are resorted to as deterrents in lieu of more severe punishments. A recent instance in the Philippines may serve to illustrate what is meant by an unusual punishment. A Philippino woman was brought to court, charged with having sold vino to soldiers. She plead guilty, was reprimanded and fined ten pesos which she could not pay. She was thereupon discharged on her promise to refrain from again committing the offense. She was arrested the next day and again pled guilty. This time she was banished to a village ten miles distant. On the third day she was again caught in the act of selling vino, and, for the third time, pled guilty. Her insolent disregard of law puzzled the court in finding a punishment. The presiding officer in his embarrassment glanced from the window of the court onto the street. It was necessary to break up the practice of selling this poisonous stuff. A barber's pole in the street gave him an idea. He resumed his seat and sentenced the woman to have her hair cut short. As Philippino women are very vain of their luxuriant hair the sentence seemed terribly severe to the culprit. Her insolence vanished and she began to beg for another chance. The sentence was immediately executed and, thereafter, not another

MARTIAL LAW.

woman in Manila sold vino to the soldiers. (19)

209. EXERCISE OF CO-OPERATIVE MARTIAL LAW is similar in all respects to the exercise of absolute martial law with the important difference that it is supplemental to certain existing civil authorities. Its application has been indicated in chapter ten. The most important question in administering co-operative martial law will be answered from the orders from which the military commander derives his authority. It is this: What are the jurisdictional limits? It is manifest that the answer to this question depends partly upon the circumstances of each particular case. But when a military force is in the field and is required to supply certain governmental functions as well as to restore order and preserve life and property, it would destroy the effect of such a force to forbid it, either directly or indirectly, to perform the duties for which it was called into the field.

210. EXERCISE OF QUALIFIED MARTIAL LAW is varied in its nature because of the extreme variety in the circumstances occasioning its use. It must be remembered that when an officer is acting strictly in aid of civil authorities, his powers are as limited as are those of the civil officer. Martial law has sometimes been defined as national self-defense and a certain locality under its civil officers is entitled to

(19) Journal U. S. Inf'y. Ass'n., January, 1907.

MARTIAL LAW.

the same class of self-defense, namely, the civil officers may do those things which are necessary to preserve peace and order, secure life and property and allay a tumult or disperse a mob. There are usually plenty of statutes which are being violated when a mob is formed, or is operating, and a sheriff's orders to a military commander ought always to be broad enough to control the situation and all conditions which may arise, but it is the duty of the governor to see that the sheriff is performing his duty and at the first intimation that the troops are being hampered, in any action which is necessary to restore quiet, the governor's order directed to the military commander should furnish the powers that are lacking. Details of this subject are indicated in the next succeeding sections.

211. ESTABLISHING QUALIFIED MARTIAL LAW. The leading case on this subject was decided by the Pennsylvania supreme court in 1903. The sheriff of Schuylkill county called upon the governor whose order calling out the guard recites conditions which existed and is as follows:

“In certain portions of the counties of Luzerne, Schuylkill, Carbon, Lackawanna, Susquehanna, Northumberland and Columbia, tumult and riot frequently occur and mob law reigns. Men who desire to work have been beaten and driven away

MARTIAL LAW.

and their families threatened. Railroad trains have been delayed and stoned, and tracks torn up. The civil authorities are unable to maintain order and have called upon the governor and commander-in-chief of the national guard for troops. The situation grows more serious each day. The territory involved is so extensive that the troops now on duty are insufficient to prevent all disorder. The presence of the entire division, national guard of Pennsylvania, is necessary in these counties to maintain the public peace. The major general commanding will place the entire division on duty, distributing them in such localities as will render them most effective for preserving the public peace. As tumults, riots, mobs and disorder usually occur when men attempt to work in and about the coal mines, he will see that all men who desire to work, and their families, have ample protection. He will protect all trains and other property from unlawful interference, will arrest all persons engaging in acts of violence and intimidation, and hold them under guard until their release will not endanger the public peace, and will see that threats, in-

MARTIAL LAW.

timidations, assaults and all acts of violence cease at once. The public peace and good order will be preserved upon all occasions and throughout the several counties, and no interference whatsoever will be permitted with officers and men in the discharge of their duties under this order. The dignity and authority of the state must be maintained, and her power to suppress all lawlessness within her borders be asserted.'”(20)

It will be seen that in this case the governor did not order the troops to report to the sheriff of Schuylkill or any other county. Owing to the extent of the disturbance he ordered a division into the field for specific duties. This order relieved the commanding officer of any duty to consult or confer with civil authorities; yet it was only an authority to exercise qualified martial law because it required the division to do certain things which the first troops on the ground, acting in aid of civil authorities, had failed to accomplish. No military districts were established, no insurrection was declared and the entire duties of no civil officer were discontinued.

It may seem from the foregoing that the distinction between qualified and co-operative martial law

(20) Commonwealth v. Shortall, 206 Pa. St., 167; Secs. 119, 193.

MARTIAL LAW.

is somewhat confused. In order to make the difference apparent it is necessary to state further that:

First. Federal troops, under the regulations, may exercise co-operative martial law, but may not exercise qualified martial law. This is because the president will not order the military commander to take any directions from civil officers.

Second. State troops in state service may be ordered to do certain things which require the exercise of martial law powers. At the same time the governor may order his civil officers to do certain things which qualify the powers exercised by the military commander. The fact that this was not done in the Pennsylvania case does not change the rule.

212. PREVENTING VIOLATION OF STATUTE. Where civil authorities are inclined to permit an act which is *malum prohibitum*, such as a prize fight, as indicated in section thirty-six, and the governor decides to prevent such a violation, qualified martial law will be necessarily used by a military commander unless the civil authorities withdraw their permission and promise to obey the law. In incidents of this class the military commander will receive a specific order and will obey it. He will use only such force as is necessary, but this force is an exercise of qualified martial law.

213. SAFE-CONDUCTS. In the exercise of abso-

MARTIAL LAW.

lute martial law, intercourse between a certain district and the surrounding country may sometimes be prohibited, under the German rule that every thing not permitted is forbidden. It will then be necessary to issue safe-conducts to trustworthy persons whose lawful business requires them to either go to or from the isolated territory. (21) These safe-conducts should be numbered and registered.

214. PROVOST COURTS may be established during the exercise of absolute martial law to relieve the military commission of certain minor functions. Their jurisdiction has customarily been similar to that of a justice of the peace or police court. (22)

215. PROVOST MARSHALS. Officers may be detailed as provost marshals for matters involving the details of martial law administration and may be supplied with certain judicial machinery and made judges of provost courts in certain districts. Orders appointing provost marshals usually fully outline their duties and may provide for provost guards to act under their direction. The provost marshal may be authorized to arrest persons accused of certain offenses, and to perform many other details of martial law administration. He may be charged with the care of all prisoners, prisons, regulation of express packages, protection of certain

(21) See par. 750, Field Ser. Reg., 1905.

(22) Winthrop's Mil. Law & Prec., pages 1252-53.

MARTIAL LAW.

classes of property, press censorship, railway passenger control, regulation of certain business houses and numerous other matters. In state service he would protect the U. S. mail service from interruption. In federal service he might be given charge of the mails. (23)

216. PROVOST OFFICERS have been occasionally detailed, and so designated, to perform a part of the duties which, by the customs of war, have been intrusted to provost marshals. Where a military commission can attend to all the trials necessary in a district in insurrection, a provost officer may be detailed with ministerial functions, and having the same relation to the commission that a judge advocate bears to a court-martial.

(23) "Among the many orders prescribing their duties, the following may be cited: G. O. 60, 188, Army of the Potomac, 1862; Do. 10, Id., 1863; Do. 35, Dept. of the Mo., 1862; Do. 22, Dept. of the South, 1864; Do. 146, Dept. of the Gulf, 1864; Do. 23, Dept. of Kans., 1864; Do. 4, and Circ. 3, Dept. & Army of the Tenn., 1864; Do. 65, Dept. of La., 1865; Do. 1, Dept. of Miss., 1865; G. Field O. 3, Army & Dept. of West Miss., 1865; Circ. 12, Dept. of Va., 1865." Winthrop's Mil. Law & Prec., p. 247.

CHAPTER EIGHTEEN.

HABEAS CORPUS.

217. FEDERAL CONSTITUTIONAL PROVISIONS.
The Constitution of the United States provides that:

“The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.” (Art. 1. Sec. 9.)

A rebellion has been legally defined as an extensive insurrection in which the insurgents have been accorded recognition by a foreign nation. To illustrate: if, in 1897, the United States had recognized the Cuban insurgents by dealing with them officially, the insurrection in the island of Cuba would have become a rebellion and many rules of international law would have been invoked in adjusting the rights of our ships in Cuban waters.

So that the constitutional provisions above quoted seems to directly negative the right of the president and of a governor to suspend the writ of habeas corpus during an insurrection. But it is probable that the words insurrection and rebellion

HABEAS CORPUS.

had the same meaning to the framers of the constitution. (1)

Other provisions of the federal constitution bear upon this question. Congress has power:

Art 1. Sec. 8. "To provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions."

And the president's powers are thus partly defined:

Art 2. Sec. 1. "The executive shall be vested in a President of the United States of America."

Art. 2. Sec. 2. "The President shall be commander-in-chief of the army and navy of the United States, and of the militia of the several states, when called into actual service of the United States."

Furthermore:

Art. 4. Sec. 2. "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

Art. 4. Sec. 4. "The United States shall guarantee to every state in this

(1) See Vol. 11, Am. & Eng. Ency. of Law (1st Edn.) p. 356; Soule's Dict. of Syn., 226; Anderson's Law Dict.; Sec. 201.

HABEAS CORPUS.

Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature can not be convened) against domestic violence."

Second Amendment. "A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed."

In construing these provisions collectively the supreme courts, both federal and state, have decided that the writ may be properly suspended under certain circumstances during insurrections and, in certain cases, during the exercise of qualified and co-operative martial law. These circumstances and cases are hereinafter separately indicated.

218. HABEAS CORPUS DEFINED. This writ does not begin a lawsuit of the ordinary description. It is, in fact, an order. This order is issued by a judge, commanding the custodian of a prisoner to bring the captive before the court, in order that the court may inquire into the cause of the confinement and either order the man released or retained by such custodian. It is neither a criminal nor an equitable action. It is a legal remedy founded

HABEAS CORPUS.

upon a writ which was recognized in Magna Charta. (2)

219. **SUSPENSION OF WRIT DEFINED.** The suspension of the writ of habeas corpus is effected in two ways.

1. The court, to whom application is made for the writ, either refuses to issue it or, after reading the return made by the custodian, decides that it has no jurisdiction.

2. The custodian, to whom the writ is issued for the prisoner, makes return on the writ showing that the court has no jurisdiction. If the court still insists on having the body of the prisoner before it, the custodian resists the order of the court.

220. **IN AID OF CIVIL AUTHORITIES.** The writ of habeas corpus is not suspended while troops are acting strictly in aid of the civil authorities. All civil officers are performing their customary duties. The courts retain their usual powers and, in fact, have greater powers than usual. For they may, in certain states, command the military officer in suppressing riots and enforcing the laws. Therefore, under these circumstances, the writ issued to a military officer will be obeyed as an order from a superior.

(2) Ex parte Collier, 6th O. St., 55; In re Miller, 1st Daly, 562; Spelling on Extraordinary Relief, Sec. 1154.

HABEAS CORPUS.

221. UNDER QUALIFIED MARTIAL LAW. If the qualified martial law has been established under such an order as is set forth in section two hundred and eleven, and the troops are specifically directed by the governor to do certain things and not permit interference from any civil officer: it is probable that under proper circumstances prisoners may be held by the military officers in carrying out their orders.

In state service the holding of prisoners by military officers should be under orders, either express or directly implied, of the governor. And as soon as order is restored the alleged offenders must be either turned over to the civil authorities or released. It is customary, however, to secure the aid of civil authorities in disposing of alleged offenders. This aid may be secured through the governor in some instances. When it is refused, the governor is advised of the situation and issues the necessary orders.

222. UNDER CO-OPERATIVE MARTIAL LAW IN STATE SERVICE. Where it is necessary for the military officers to hold prisoners, and orders expressly empower them to do so, the writ of habeas corpus is suspended. But the conditions are often similar to those indicated in the preceding section. If such prisoners are so held and a writ is served upon the officer in charge of prisoners, or upon the command-

HABEAS CORPUS.

ing officer, he should immediately make return thereon as indicated in the next section.

223. FORM OF RETURN ON WRIT. The following form for return on writ of habeas corpus may be used in proper cases. Its use is limited to state courts, state troops and state service, but it is readily changed to suit other conditions:

COURT OF COMMON PLEAS, FRANKLIN
COUNTY, OHIO.

In re	}	On Habeas Corpus
Richard Roe		Return of Respondent.

To the Honorable _____ Judge of the Court.

The respondent in the hereinabove entitled action, Captain Richard Hull, 4th Infantry, O. N. G., upon whom has been served the writ of habeas corpus herein issued, respectfully makes return to the same and states that he holds the said Richard Roe by the authority of the State of Ohio and the governor thereof, under circumstances as follows, towit:

That, etc.

(Here state substance of governor's order, cause of arrest, and reasons for holding prisoner in custody. A full statement is necessary so that the court may determine the jurisdictional question).

Wherefore, without intending any disrespect to this Court, but for the reason that he is advised and believes that the said writ, under said circum-

HABEAS CORPUS.

stances, should not be enforced, and that this Court has no jurisdiction in the premises and in obedience to the order of
.....this respondent respectfully declines to produce to this Court the body of the said Richard Roe.

RICHARD HULL,
Capt. 4th Inf'y. O. N. G.
"Officer in Charge of Prisoner"
or "Provost Marshal."

224. ILLUSTRATION UNDER CO-OPERATIVE MARTIAL LAW. On May 4th, 1899, the governor of the State of Idaho issued a proclamation of which the following is a part:

"State of Idaho, Executive Office.

Whereas, it appearing to my satisfaction that the execution of process is frustrated and defied in Shoshone county, state of Idaho, by bodies of men and others, and that combinations of armed men to resist the execution of process and to commit deeds of violence exist in said county of Shoshone; and whereas, the civil authorities of said county of Shoshone do not appear to be able to control such bodies of men, or prevent the destruction of property and other acts of violence," etc.

This proclamation also declared that a state of insurrection existed in Shoshone county. Under

HABEAS CORPUS.

these circumstances, the supreme court of the state, in a case involving these facts, held:

"In case of insurrection or rebellion, the governor or military officer in command, for the purpose of suppressing the same, may suspend the writ of habeas corpus, or disregard such writ, if issued." (3)

225. UNDER CO-OPERATIVE MARTIAL LAW IN FEDERAL SERVICE. Speaking on this question, the supreme court of the United States, in a noted case which grew out of the draft riots during the latter part of the civil war, in Indiana, said:

"The power to make the necessary laws is in Congress; the power to execute, in the president. Both powers imply many subordinate and auxiliary powers. *Each includes all authorities essential to its due exercise.* * * * Congress can not direct the conduct of campaigns, nor can the president, or any commander under him, without the sanction of Congress, institute tribunals for the trial and punishment of offenses, either of soldiers or civilians, *unless in case of a controlling necessity, which justifies what it compels.*" (4)

(3) In re Boyle 57 Pac., 706.

(4) Ex parte Milligan, 4 Wallace, 139.

HABEAS CORPUS.

Continuing, the court illustrated its position by holding that, under co-operative martial law, where the courts were open, it was not always safe for the military commander to resort to such courts for trial, using the following language:

“Courts might be open and undisturbed in the execution of their functions, and yet wholly incompetent to avert threatened danger, or to punish, with adequate promptitude and certainty, the guilty conspirators. * * * In times of rebellion and civil war it may often happen, indeed, that judges and marshals will be in active sympathy with the rebels, and courts their most efficient allies.” (5)

The foregoing statements are of more value than ordinary court *dicta* because they were statements uttered in a case where the writ was enforced. The writ was upheld because Indiana was a loyal state, no insurrection existed and a federal grand jury had failed to return an indictment against Milligan, then in custody; but mainly because no controlling necessity for suspending it existed.

It would seem from the foregoing rules that the safer plan for troops in federal service, exercising co-operative martial law, would be to:

First. Turn civilian prisoners over to the state

(5) *Ib.*, 140, and see Sec. 246.

HABEAS CORPUS.

civil authorities for trial where the military commander is satisfied that the state courts are able and willing to conduct the trials and inflict proper punishment. These prisoners could be turned over either at termination of the tour of duty, or during the time of the military occupation.

Second. Or the military commander may furnish a list of civilian prisoners to the next federal grand jury in the district and if any fail of indictment he may advise the president of the facts and abide by his order. If the president decides that a controlling necessity exists, for retention in custody of these prisoners, this decision is final.

Third. Or where a military district is controlled by a military provisional government under martial law and the president has found, and stated by order, that it is necessary for the restoration of order that certain civilian prisoners be held by federal troops, this order may be safely obeyed. (6)

226. UNDER ABSOLUTE MARTIAL LAW IN STATE SERVICE. The establishment of absolute martial law by the governor or the proper state authorities carries with it the right to suspend the writ of habeas corpus during the entire time that such absolute martial law is exercised. This prin-

(6) Dow v. Johnson, 100 U. S., 158, 169, 170; Freeland v. Williams, 131 U. S. 405, 416; in re Kemp, 16 Wis., 390; Ford v. Surgett, 97 U. S., 594, 604; Judge Grosscup's charge, 62 Fed., 828.

HABEAS CORPUS.

ciple is not qualified by the state constitutional provisions which declare that the military shall always be subordinate to the civil power. The celebrated habeas corpus case *In re Moyer*, decided in 1904, furnishes the following statement of this rule:

“The governor, in employing the militia to suppress an insurrection, is merely acting in his capacity as the chief civil magistrate of the state, and although exercising his authority conferred by the law through the aid of the military under his command, he is but acting in a civil capacity. In other words, he is exercising the civil power vested in him by law through a particular means which the state has provided for the protection of its citizens. No case has been cited where the precise question under consideration was directly involved and determined, but in cases where the courts have had occasion to speak of the authority of the military to suppress insurrection and the means which may be employed to that end, it has been stated that parties engaged in riotous conduct render themselves liable to arrest by those engaged in quelling it.

To deny the right of the militia to detain those whom they arrest while en-

HABEAS CORPUS.

gaged in suppressing acts of violence and until order is restored, would lead to the most absurd results." (7)

It will be noted that this decision is based upon the fact that the governor may act as chief executive. It could also have been based upon the fact that the governor was commander-in-chief of the militia. Moreover, the martial law exercised in this instance was probably only co-operative, so that the rule applies with even greater force in absolute martial law.

227. UNDER ABSOLUTE MARTIAL LAW IN FEDERAL SERVICE. The president, under the constitutional provisions shown in section two hundred and seventeen and the statutes thereunder shown in section forty-two, has the now undoubted right to suspend the writ of habeas corpus during his military occupation of a district in insurrection. But except under controlling necessity, or in exercising the powers conferred by the federal statutes, this right resides in congress. Whenever the president may exercise this right, he may delegate it to his military commanders. The right of the president

(7) In re Moyer, 85 Pac., 190; Citing In re Kemp, 16 Wis., 382 (413). Luther v. Borden, 7 Howard, 1; Johnson v. Jones, 44 Ill., 142. The right to suspend the writ in the Moyer case was established under proclamations very similar to those shown at Secs. 142, 144.

HABEAS CORPUS.

to suspend the writ of habeas corpus under martial law depends upon his power to exercise martial law. The exercise of absolute martial law suspends the writ. (8)

228. STATE COURT WRIT SUSPENDED, IN PEACE, IN FEDERAL SERVICE. A writ of habeas corpus was issued by a state court to a U. S. recruiting officer, for an enlisted man alleged to be under 18 years of age and therefore unlawfully recruited. The case finally (1871) reached the supreme court of the United States where it was held that as soon as the officer having custody of the party had made written return to the writ, showing that the party was held by an officer of the United States, under authority of the United States, the state court could proceed no further in the matter, for the state court had no jurisdiction to issue a writ for discharge of the party.

The principal ground for this opinion seems to be that the state court could not construe the federal statutes relating to enlistments in the regular army. This writ should have been issued from a federal court. It would then have been obeyed. (9)

(8) Ex parte Field, 5 Blatchford, 82; Winthrop's Mil. Law & Prec., 1291; Birkhimer Mil. Gov. & Mar. Law, 378; See cases cited in footnotes to Sec. 225.

(9) Tarbles' Case (13 Wallace, 397.)

CHAPTER NINETEEN.

TAKING PRIVATE PROPERTY.

229. IN AID OF CIVIL AUTHORITIES, military commanders have no authority to take private property. But a military necessity may possibly arise under these conditions. If no contracts can be made for subsistence, it may be necessary to demand that the civil authorities procure provisions. If this demand is not complied with, an order from the governor will be required under which an officer may take or requisition provisions, giving accurate receipts for whatever is procured. State officers of the general staff see that all necessities, furnished to state troops, are paid for. Compensation is also fairly made for all damages to horses and other property used. If personal property is unnecessarily injured or abused the responsible officer, or man, without exception, should bear the burden and punishment. But the state may act as his surety in indemnifying the person who has been damaged.

In every instance where troops are required to use property for quarters or camp sites, public property should be first sought.

230. UNDER QUALIFIED MARTIAL LAW. Military necessity may require the commanding officer,

TAKING PRIVATE PROPERTY.

on rare occasions, to take private property. Such taking would only be justified where it was absolutely necessary in carrying out his orders. Wherever it is possible to make contracts for necessities, none will be taken.

The hasty construction of barricades or other defensive works is often necessary to save lives and valuable property and it seems to have been the custom to use materials nearest at hand for these purposes. But this is often accomplished by consent of the owner, for this very property may be destroyed if not so used.

Under qualified martial law the action of troops is occasionally directed toward one class of persons and only certain civil officers have shown weakness in the discharge of their duties. Property of these persons, who have caused the disorder, should, if its use is necessary, be first requisitioned.

231. UNDER CO-OPERATIVE MARTIAL LAW. If the civil authorities, who are still on duty, are able to furnish necessary supplies, they will be requested to do so before demand is made on other civilians. Private property may be requisitioned or taken from certain classes of persons, if the property is absolutely necessary for subsistence, quarters, shelter or defense of the troops, or for hospitals. The persons from whom such property is first taken are:

1. Persons actively engaged in the insurrection.

TAKING PRIVATE PROPERTY.

2. Persons giving aid and comfort to those so actively engaged.

3. Persons in sympathy with the insurgents.

Military necessity will be extreme before proceeding further. (1)

232. UNDER ABSOLUTE MARTIAL LAW. Necessaries may be taken in the same order as shown in the last preceding section. This is practically following the federal field service regulations. (2)

In some rare instances private houses may be used as quarters. These instances arise where, in extreme weather, use of such habitations is absolutely necessary to preserve the men; and where inhabitants have fled; and where the inhabitants

(1) A military officer may, without liability, take private property under circumstances of pressing public necessity. *Holmes v. Sheridan*, 1 Dill. (U. S.) 351, 12 Fed. Cas. No. 6,644, holding that whether the taking of such property is justified by the necessity of the case is a question for a jury. And see *Jacobs v. Levering*, 2 Cranch (C. C.) 117, where it was held that: "A commanding officer of militia has no authority to impress the horse of a citizen, even in time of war."

(2) Par. 710 Field Ser. Reg., 1905; *Mills on Eminent Domain*, Sec. 3; 13 Am. Law Reg., 265, 337, 401. The taking, injuring and destruction of property in time of war, is an exercise of power allied to the common law right of civilians, in cases of emergency, where the danger is imminent and admits of no delay, to control and destroy property to avert a public calamity. Such as the right to demolish buildings to prevent the spread of a conflagration. The

TAKING PRIVATE PROPERTY.

are known insurgents and under surveillance. (3)

233. **MILITARY CONTROL OVER PROPERTY.** Under the doctrine of postliminy, no disposition of real estate may be made by military authorities unless such transfer terminates with military occupation of the district. (4) The exception to this rule is found where a military provisional government executes a lease, for a term of years, for certain public property. In a case in New Orleans during the civil war the military government leased certain public property for ten years. The civil authorities resumed control of the government a few months after this lease was made. They thereupon attempted to rescind the lease. The lessees contested the question because they had spent large sums in improving the property. The supreme court of the United States finally decided that the lease was valid and should subsist for its full term. (5)

war power is founded on analogous necessity. It is not an exercise of the right of eminent domain. Lewis on Em. Dom., Secs. 7, 8; Russell v. Mayor of New York, 2 Denio, 461, 474; 2 Kent. Com., 338; Bell v. L. & N. Ry. Co., 1 Bush (Ky.) 404.

(3) Mitchell v. Harmony, 13 How., 115.

(4) See postliminium, Burrill's Law Dict; Birkhimer Mil. Gov. and Mar. Law, Sec. 228; Davis' International Law, p. 266 et seq.

(5) New Orleans v. Steamship Co., 20 Wallace, 387.

TAKING PRIVATE PROPERTY.

The military commander has the authority of a custodian over all public property in his district, but may not transfer it permanently. Money may, on urgent demand and by properly securing authority, be used in the purchase of provisions for the troops on service in the district. (6)

234. PRIVATE PROPERTY OF PRISONERS. The commanding officer may appoint an officer in charge of prisoners who may, with martial law prisoners, be required to follow military law as follows:

“He (this officer) will have charge of the property, money and valuables belonging to prisoners, which they are not permitted to keep in their possession, and will disburse said money, when desired by the owner, for such purposes as may be approved by the commanding officer.” (7)

When martial law is being exercised in a military district this officer in charge of prisoners may perform the duties mentioned, with other functions, under the title of provost marshal or provost officer.

235. DESTRUCTION OF CROPS. The burning and destruction of crops and supplies, to prevent their falling into the hands of the enemy, has been authorized on the ground of the public safety. But this rule applies only to insurrection where some

(6) 9th Article of War; 22 Opinions Atty. Gen'l., 548.

(7) Par. 325 Man. Gd. Duty.

TAKING PRIVATE PROPERTY.

of the insurgents compose armed bands and these bands are in the field against governmental troops.

(8)

236. GROUND FOR ENCAMPMENTS. The power to take property does not include the power to encamp on the private lands of civilians without their consent except in time of war. (9) But the question as to what is a time of war is a little uncertain when troops are suppressing domestic violence and acting independently of minor civil authorities. Under qualified martial law a compelling necessity might require troops to encamp on private grounds against the protest of the owner. Such encampments should not be made unless no other grounds in the neighborhood can be obtained by agreement; and instances are rare in which it will be necessary to exercise this questionable right. This is so for almost every occasion finds either public or vacant property available and, failing these, certain persons are nearly always ready to contract for the temporary rental of suitable camp sites.

237. PROVISIONS, when not obtainable under the regulations, or by contract, are obtainable in the following order. First, by requisition on civil authorities. Second, from the persons and in the order shown in section two hundred and thirty-one.

(8) *Respublica v. Sparhawk*, 1 Dall., 383.

(9) *Brigham v. Edmands*, 7 Gray, 359.

TAKING PRIVATE PROPERTY.

It is unlawful to impress provisions when there is no immediate urgency. (10)

238. COMPENSATION. The federal government, during the late civil war, enacted several statutes which mitigated the harshness of the ancient rules relative to the taking of private property by armies. Compensation was generally provided for property taken or occupied in the loyal states during the civil war. When land was entered upon and occupied, the occupation was considered to be under an implied lease, at a reasonable rental, which was determined by an appraisement. (11)

Prior to the civil war, the federal congress was besieged by applications for relief in cases where citizens had lost wagons, horses, mules, harness and other property in transporting detachments of the regular army throughout parts of the then undeveloped western country. This private property had been contracted for by army officers, or had been, in cases of urgency, impressed by them, and had been injured or destroyed in Indian fights and in long marches over wild country where no roads existed and forage and water were procurable at such irregular intervals as to cause great hardship.

(10) *Cunningham v. Campbell*, 33 Ga., 625; *Cox v. Cummings*, Id., 549; *Mitchell v. Harmony*, 13 How., 115.

(11) *Johnson v. United States*, 4 Ct. of Cl., 248; *Waters v. United States*, 4 Ct. of Cl., 389.

TAKING PRIVATE PROPERTY.

The federal congress finally evolved a plan for proper compensation in these cases, without the necessity of special acts. This plan consisted in making the third auditor of the treasury an adjuster. (12) Later the federal court of claims was established and relieved both the auditor and congress of the duty of examining into the merits of individual claims for compensation. (13)

239. PRIVATE PROPERTY OF OFFICERS AND ENLISTED MEN. The federal army regulations provide specific rules under which compensation may be obtained for private property of officers and men lost under specified circumstances. (14) These rules apply to militia in federal service. The rules relative to such compensation, in state service, are various; but many states closely follow the federal plan as to proof of loss. These proofs are filed with the adjutant general, who is usually compelled to embody the adjusted claims in an emergency appropriation bill, and introduce it in (and lobby it through) the next legislature.

(12) Act of Congress, March 3rd, 1849.

(13) Act of February 24th, 1855, 10 Stat. L., 12; The jurisdiction of the court of claims is defined in 8 Wallace, p. 269; 13 Wallace, p. 136.

(14) Par. 729 A. R., 1904; par. 334 Quartermaster's Man., 1904.

CHAPTER TWENTY.

LIABILITY OF OFFICERS UNDER CIVIL LAW.

240. PROTECTION AFFORDED BY GOVERNOR'S ORDERS. It may be stated as a general proposition that a militia officer in state service cannot become liable to any one because of having faithfully and specifically carried out the written orders of the governor. / The exceptions to this rule are extremely rare and may occur in those few states where the governor's executive powers are curtailed by the constitution. In a decision of the supreme court of Pennsylvania, two paragraphs of the syllabus read as follows:

“The governor is exempt from the process of the courts whenever engaged in any duty pertaining to his office, and his immunity extends to his subordinates and agents when acting in their official capacity.

The governor is the absolute judge of what official communications, to himself or his department, may or may not be revealed, and is the sole judge not only of

LIABILITY OF OFFICERS.

what his official duties are, but also of the time when they should be performed." (1)

The above case arose out of the Pennsylvania riots of July, 1877, which were caused by a strike of railway employes. Militia was sent to open a railroad. Riot ensued. Strikers and militiamen were killed. Immense properties were destroyed by fire. In October, 1877, a grand jury of Allegheny county attempted to subpoena the governor, adjutant general and two other officers of the militia.

The court, in deciding that the grand jury had no right to subpoena these officers, said:

"We recognize the fact, that the executive department is a co-ordinate branch of the government, with power to judge what should and should not be done, within its own department, and what of its own doings and communications should or should not be kept secret, and that with it, in the exercise of these constitutional powers, the courts have no more right to interfere, than has the executive, under like conditions, to interfere with the courts."

Many of the foregoing points, decided by the syllabi and in the opinion, are of considerable value in determining the conduct of officers with reference

(1) Appeal of Hartranft, et al., 85 Pa. St., 433.

LIABILITY OF OFFICERS.

to civil proceedings after the conclusion of the tour of duty. They state the principles under which the rule first herein stated was evolved by the courts. (2)

This section should be read in connection with sections sixty-seven and sixty-eight in order to obtain a full view of the governor's executive powers.

241. **NECESSITY FOR PROOF.** The surest method to avoid liability, by officers commanding troops in home service, is to provide, before issuing any order that may be questioned in the future, two things:

(2) The courts cannot compel the governor to perform any duties appertaining to his office; nor can they interfere with his discharge of them, nor control him in any matter of executive discretion; *State of La. ex rel v. Warmouth, Governor, et al.*, 22 La. Ann. Rep., 1; *Mauran Adj. Gen'l. v. Smith, Governor*, 8 R. I. Rep., 192; *The People ex rel v. Bissell, Governor*, 19 Ills., 229; *The State ex rel v. Towns, Governor*, 8 Ga., 360; *Hawkins v. Governor*, 1 Ark., 570; *Mott et al. v. Penna. Co. et al.*, 6 Casey, 33.

The legislative, executive and judicial departments of the government are distinct and independent, and each one should protect itself from the encroachments of the others; *De Chastellux v. Fairchild*, 3 Harris, 18; *Greenough v. Greenough*, 1 Jones, 489; *Ervin's Appeal*, 4 Harris, 256; *Burns v. Clarion County*, 12 P. F. Smith, 422; *Johnson v. Halloway*, 6 Wright, 446.

Every department of the government has its secrets of state, or privileged communications, which it is not only the right of the officer to refuse to disclose, but his duty to withhold. 1 Green'l Ev., Sec. 250, 251.

LIABILITY OF OFFICERS.

First. That proof exists which shows the officer to be justified in giving the order.

Second. That this proof will be available if it is ever needed.

If an officer is justified in giving an order, his right to issue the same will hardly be questioned afterwards, in a criminal or civil proceeding, if it is known that the officer possesses proof showing his justification. The importance of preparing proof before an officer takes any arbitrary action may be illustrated by an incident of the Spanish War. It occurred at night in a cavalry camp. The officer of the day was making his rounds, alone, at 2 o'clock of a dark night. On arrival at the picket line of one troop he was not challenged by the sentry. He passed around the foot of the line and came towards camp between this picket line and an adjacent one of another troop. He was not challenged by the sentry of the second picket line. Proceeding toward the forage piles he discovered both these sentries sound asleep upon the bales of hay. He put them in arrest, confined them *together* in the guard tent, and preferred charges the next day. The prisoners were brought, in due course, before a general court-martial. The maximum sentence was death as the offense had occurred in time of war. The officer told the facts, as a witness, to the court. The defendants both testified that they were

LIABILITY OF OFFICERS.

exchanging notes concerning a stray horse when the officer of the day arrested them. That they had not been asleep, but had failed to notice the approach of the officer because of their discussion about the horse. Thus the evidence stood, two witnesses for defendant and one for the United States. It is easy to guess the conclusion and the discomfiture of the officer under the circumstances.

242. IN AID OF CIVIL AUTHORITIES. When state troops are ordered into state service by a minor civil authority, and when state troops are ordered by the governor to report to a minor civil authority and act under him, the commanding officer's responsibility includes two things:

First. He must not execute any order which is beyond the powers of the civil authority. This same civil officer may be one of several whose functions are co-ordinate.

Second. He must not go beyond the orders of the civil authorities and do things on his own responsibility. In other words, he may only carry out orders received from the civil officer.

Under the first limitation he must know what the powers of the civil authorities are, or take chances on the order being valid. The general powers of these civil authorities have been outlined in chapter nine. In riot duty the statute of the state commonly provides that peace officers have, for the

emergency, extraordinary powers. (3) This riot statute should be familiar to the officer. He must not construe it too liberally, because while in general terms it seems a justification for severe measures; the question of whether or not these measures were unnecessarily severe under the circumstances is sometimes left to a jury. And it may therefore be necessary to furnish proof, in a subsequent civil law proceeding, that a certain drastic action, taken by the troops, was only a necessary exercise of force under the circumstances. If this proof is available, the officer has still been put to the trouble of producing it and using time and money in justifying an action which he thought was for the public good. But the occasions just mentioned are extremely rare and may be easily avoided. Whenever an officer is ordered to do something, and doubts the authority of the civil officer who gave the order, he should report to the governor and get a direct order from him. If there is not time to do this—the fact that there is not time may be sufficient justification for obeying the order.

Under the second limitation the officer may require the civil officer to give definite orders as to what general duties are to be performed. These orders should be in writing or in the presence of witnesses. They should then be obeyed without using unnecessary force.

(3) See Sec. 116.

LIABILITY OF OFFICERS.

Self-defense includes the right of an officer, even acting under civil officers, to take whatever action is necessary to defend his men and himself from injury or death. But here, also, no unnecessary force may be used.

It will seem from the foregoing outline that acting in aid of civil authorities may be no sinecure. It is one of the necessary duties of the militia in state service, but is not required in federal service of either militia or the regular army. The limitations imposed in this service are avoided by the governor taking charge of the situation.

The validity of an order received is easily determined. It is not necessary to absolutely know that an order is lawful. It may be assumed that the order is lawful unless the officer has forcible reason to believe that it is unlawful. (4) In fact, the only real danger, in service in aid of civil authorities, arises where all the civil authorities are not in accord. Instances of this disaccord are indicated in chapters nine and ten and the rules there laid

(4) Persons who act in aid of a sheriff, by the sheriff's command, are justified, though the sheriff himself has abused his authority, provided they acted in good faith in obedience to his command, and not to gratify his or their malice. *State v. Stalcup*, 2 Ired. L. (24 N. Car.) 50; *Com. v. Field*, 13 Mass., 321; *Thrailkill v. Daily*, 16 Nebr., 114. These persons were civilians.

down indicate, *in extenso*, the officer's liability in the performance of this duty.

Civil officers must at all times be treated with proper respect. The civil courts, except under martial law, must not be interfered with. A case is reported in Ohio where a militia officer was cited for contempt because he held muster in the immediate vicinity of the court in session. This event occurred about 1834. The citation was probably caused by the militia officer failing to heed the request of the court bailiff to stop the music.(5)

243. STATE RIOT STATUTES, OPPRESSIVE ACTS. In *Despan v. Olney*, (6) a military officer, who had acted under orders of the commanding general, was sued for arresting and confining the plaintiff. The state was then under martial law, and the defendant pleaded a statute which barred all actions, for acts done while the state was under martial law, provided such acts were intended to preserve the peace, and to aid the people and government against the open or suspected hostility of the person complaining. Issue was joined upon the averment of the plea that the act in question was done with that intent. Judge Curtis instructed the jury, in part, as follows:

(5) Wright's Reports, 78 Id., 421.

(6) 1 Curt., 308, Fed. Cas. No. 3,822. And see *In re Ezeta*, 62 Fed., 972; *Luther v. Borden*, 7 How. (U. S.) 1.

LIABILITY OF OFFICERS.

"It is enough to say that, under the issue you are trying, the existence of martial law is not, of itself, a justification of the defendant. He must also satisfy you that the act done by him, under that law, was intended by him to preserve the peace of the state, and to aid the existing government, and not from recklessness, or a love of power, or to gratify any bad passion. Still, the fact that martial law existed has a most important bearing on the question of the intent of the defendant. He held a commission as captain. He received an order from his commander. He was bound to obey all lawful orders. And if this order was one which, upon its face, was lawful, and he did no more than execute it, you will consider whether it would not be proper to conclude that he acted simply with an intent to do his duty, unless some other intent appears. Now, as martial law existed, and as Major General Anthony had authority under that law, for sufficient cause known to him, to cause the arrest of the plaintiff, the order to do so was, upon its face, a lawful order. And I do not think the defendant was bound to go behind an order, thus

LIABILITY OF OFFICERS.

apparently lawful, and satisfy himself, by inquiry, that his commanding officer proceeded upon sufficient grounds. To require this would be destructive of military discipline, and of the necessary promptness and efficiency of the service."

244. UNDER QUALIFIED MARTIAL LAW. The orders from the governor indicate the duties to be performed and give the commanding officer discretionary powers as to the performance of these duties. His orders are necessarily limited to carrying out the orders of the governor. His liability has been defined as follows:

"Except in a plain case of excess of authority, where at first blush it is apparent and palpable to the commonest understanding that the order is illegal, I cannot but think that the law will excuse a military subordinate, when acting in obedience to the order of his commander. Otherwise, he is placed in a dangerous dilemma of being liable to damages to third persons, for obedience to the order, or for the loss of his commission, and disgrace for disobedience thereto. * * * Between an order plainly legal and one palpably otherwise there is a wide middle ground where the ultimate legality and

LIABILITY OF OFFICERS.

propriety of orders depends or may depend upon circumstances and conditions, of which it cannot be expected that the inferior is informed or advised. In such cases justice to the subordinate demands, and the necessities and efficiency of the public service require, that the order of the superior should protect the inferior, leaving the responsibility to rest where it properly belongs, upon the officer who gave the command." (7)

Orders being relied upon, under the foregoing rule, the only liability which the officer may incur, is in the execution of these orders. In such execution he is safe if he acts with intent to obey the order and not from recklessness, or a love of power, or to gratify any bad passion. Therefore, as a general rule, if an officer acts solely with intent to obey his orders he is not responsible for the consequences. (8)

(7) *McCall v. McDowell*, 1st Abb. (U. S.) 212; *Commonwealth v. Shortall*, 206 Pa. St., 165.

(8) In England it has been repeatedly held that no civil action will lie in the first instance against a commissioned officer for a discretionary exercise of military authority while in the performance of official duties. If the authority be discretionary, questions regarding its exercise are so essentially military that the English civil tribunals decline to consider them with-

245. PROTECTION AFFORDED BY PRESIDENT'S ORDERS. Orders of the president have a much wider scope than those of a governor. They may require the overthrow of an entire state government and the institution of a provisional government to exist until another, such as is guaranteed by the federal constitution, is formed. Yet the war power of the nation is divided between the president and congress. Because of this division congress invested the president with the powers indicated in the statutes shown at section forty-two. These statutes provide the powers under which the president acts in insurrections and in enforcing the laws of congress. Under these statutes the president's powers are supreme and his orders have the same force and are hedged about by the same safe-guards as are indicated, with reference to a governor's powers, in section two hundred and forty.

246. OFFICERS DISCRETIONARY POWERS. FEDERAL SERVICE. In application of the foregoing rule federal military officers have occasionally made the mistake of using martial law powers where martial law was not being exercised. An instance of this kind occurred in Indiana during the civil war. A provost marshal ordered civilian saloonkeepers out the previous judgment of a court martial. Pendergrast, p. 138; Birkhimer, Sec., 583; Barnis v. Keppel, 2 Wilson, p. 314; Sutton v. Johnson, 1 Term Reports, 548.

not to sell liquor to soldiers. One disobeyed and was taken into military custody. Growing out of this and similar facts the civil courts proclaimed the following rule:

“A military officer, acting under instructions from his superiors, acts at his peril, and, if those instructions are not strictly warranted by law, he is answerable in damages to any person injured by their execution.” (9)

While this rule is often cited it is, as a general proposition, not good law. It should be confined to the case which caused its utterance. It was good there because the provost marshal had no martial law powers in the loyal state of Indiana and there was no insurrection or military occupation. He probably only had military law powers over troops in a certain district.

An officer of the United States army, while acting in the discharge of his duty, in obedience to or-

(9) *Griffin v. Wilcox*, (1863) 21 Ind., 370; *Hogue v. Penn*, 3 Bush (Ky.) 663, 96 Am. Dec., 274; *Terrill v. Rankin*, 2 Bush (Ky.) 453, 92 Am. Dec., 500; *Eifort v. Bevins*, 1 Bush (Ky.) 460; *Mitchell v. Harmony*, 13 How. (U. S.) 115; 14 L. ed. 75 (affirming 1 Blatchford (U. S.) 549, 11 Fed. Cas. No. 6,082); *Little v. Barreme*, 2 Cranch (U. S.) 170; 2 L. ed., 243; *McCall v. McDowell*, 1 Abb. U. S., 212; *Clay v. U. S. Dev. Ct. Cl.*, 25.

LIABILITY OF OFFICERS.

ders of the secretary of war, who in turn is executing an act of congress, is not subject to arrest on a warrant or order of a state court. In such a case an officer can obtain his discharge by habeas corpus issued from a federal court. (10)

But this rule raises a question as to what acting in the discharge of the officers duty means. On January 2, 1906, the supreme court of the United States rendered a decision which answers the question concerning the duty in time of peace. An officer and an enlisted man in the military service of the United States were indicted for murder and held for trial in a state court. At their station, Allegheny Arsenal, these two had been ordered to hunt for civilians who had been stealing copper eave troughs from arsenal buildings. One morning they tried to catch a person in the act. They left the U. S. grounds and came upon this civilian, Crowley, from different directions. Crowley ran and was shot and killed by the enlisted man. At this time none of the three were on the U. S. reservation. There was disputed testimony tending to show that Crowley stopped and held up his hands and that the officer thereupon ordered the enlisted man

(10) In re Turner, 119 F. 231; In re Neagle, 135 U. S., 1, 10 S. Ct. 658, 34 L. ed., 55; Ohio v. Thomas, 173 U. S. 276, 19 S. Ct. 453, 43 L. ed., 699; Sec. 761 U. S. Rev. Stat.; In re Waite, 81 Fed. Rep., 359.

to fire. Under these facts the supreme court of the United States finally decided that its circuit court had properly declined to wrest the petitioners, on habeas corpus, from the custody of the state officers in advance of trial in the state court. (11) In this case the unfortunate young officer made the mistake of using questionable martial law powers in time of peace. Notwithstanding this, if Crowley had committed a felony, and had been shot while fleeing, the United States court would have taken these two prisoners, on habeas corpus, from the state court. It therefore behooves any officer, federal or state, civil or military, to be careful of his legal status in determining what his powers are under general directions from a superior.

After determining the legal status and that martial law is being exercised, the officer's discretionary powers are identical with those outlined in section two hundred and forty-four.

247. UNDER CO-OPERATIVE MARTIAL LAW IN FEDERAL SERVICE. It often happens, in this service, that the moral effect, on the insurgents, of the presence of federal troops, is alone sufficient to enable the civil authorities, or state troops, to regain control of the situation. Under such circumstances the exercise of force by federal troops is sometimes unnecessary. Where it is necessary it may be suf-

(11) *Drury v. Lewis, Jail Warden*, 200 U. S., 1.

ficient to accomplish desired results, as indicated in the officer's orders. During the performance of this duty, civil state courts cannot interfere with either officers or men. (12) At termination of the duty the federal troops may be removed from the state. (13) If they remain on duty in the state their liabilities are those indicated in the next section.

248. UNDER CO-OPERATIVE MARTIAL LAW IN STATE SERVICE. No officer is liable for the proper performance of duty, under orders, if he carries out his orders with intent solely to perform that duty and does not plainly exceed his authority. (14)

He is not liable, as just stated. But on rare occasions he may be required to prove that he is not liable. These occasions arise when he is charged with a crime under civil law or is sued for damages in a civil court. Access to grand juries and to courts of law is easy. No officer can absolutely prevent the action of a grand jury, the filing of an affidavit for warrant or of a petition for damages. But he can reach an irreducible minimum of trouble by properly qualifying himself for the performance of his duties, keeping cool and always arranging for proof of justification.

(12) See Sec. 246.

(13) See Sec. 178.

(14) See chaps. 17 and 18.

249. UNDER ABSOLUTE MARTIAL LAW. The ultimate liabilities of officers are the same as those outlined in the two preceding sections, but their discretionary powers are often very much greater. The commanding officer is the head of a provisional government. His territory is bounded by the military district occupied by his troops. He must supply the functions of the missing civil officials, establish courts of justice, bring about domestic tranquility and ultimately secure the blessings of liberty to those civilians who have so far forgotten the requirements of civilization as to lapse into anarchy. These are the most important duties with which man can be intrusted. Their performance therefore requires the exercise of experienced judgment by the commanding officer. His military commissions, in dispensing justice, may do well to remember Blackstone's famous eulogy on the law; that law is:

"A science which distinguishes the criterions of right and wrong, which teaches to establish the one and to prevent, punish, or redress the other, which employs in its theory the noblest faculties of the soul, and exerts in its practice the cardinal virtues of the heart. A science which is universal in its use and extent;

adapted to each individual, yet comprehending the whole community."

Under martial law this maxim may be applied to those civilians who evidence a genuine intention of helping to restore civil government. And yet, as has been said in section two hundred and seven, it is more necessary to exercise deterrent influences in the administration of martial law than in that of civil law. Aroused passions can often be restrained only through fear. Where, in dealing with certain elements of the community, it is necessary to inspire fear, the necessary force may be lawfully applied under the usages and customs of war.

250. FOR UNNECESSARY VIOLATION OF STATUTE. In a case decided in New York in 1814, it was held that a militia captain was liable, in a statutory penalty, for ordering an assembly of his company on election day, in violation of a statute prohibiting assembly on that day. It was also held that the captain was not protected, in such case, by the order of his colonel. (15) This decision was in time of peace.

251. FOR NECESSARIES FOR TROOPS. Where a commanding officer is lawfully exercising martial law powers, and his duties require the troops to do certain things, and the troops must have food, forage and shelter to enable them to do these things,

(15) Hyde v. Marvin, 11 Johns. (N. Y.) 521.

LIABILITY OF OFFICERS.

and these necessities cannot be otherwise obtained than from civilians; the officer, on showing all of these conditions, is relieved from any personal responsibility for the taking of such necessities in quantities sufficient to supply urgent needs. (16)

252. FOR PROPERTY STRATEGICALLY DESTROYED. The right to destroy property to prevent its falling into the hands of the enemy must be cautiously exercised under martial law. In such case the officer acts on his own responsibility except where express orders have been received. If he, without orders, gives an order to destroy private property, acting under a reasonable apprehension that his order was necessary for the public safety, and acting on information on which he had a right to rely, the destruction is justifiable and the loss is the owner's misfortune. The officer is personally responsible unless his order was justified. (17)

253. FOR TRESPASS BY SUBORDINATE. A person in command is not liable for a trespass committed by any of his command without his knowledge or abetment. (18) But, if he advises or

(16) See citations in chapter 19.

(17) Lewis on Eminent Domain, Sec. 8; Mitchell v. Harmony, 13 How., 115; Farmer v. Lewis, 1 Bush (Ky.) 66; Dills v. Hatcher, 6 Bush, 606.

(18) Witherspoon v. Farmers Bank, 2 Duv. (Ky.) 496, 87 Am. Dec., 503; Echols v. Stanton, 3 W. Va., 574.

aids such trespass, the fact that he was so acting is no defense. (19)

254. *IN PARI DELICTO*. The following interesting decision, in 1869, grew out of the civil war conditions.

“The courts of one of the seceded states cannot, since the re-establishment of the national authority, entertain an action to recover damages from a railroad company for negligently causing death of plaintiff’s husband, where the casualty occurred while the company was transporting the decedent, as an officer in the confederate service, for hire paid by the confederate government. The employes of the company and the decedent were, while engaged in such transportation, in *pari delicto*.” (20)

255. *FOR FRAUDS IN SERVICE*. A United States district court has jurisdiction to indict and try a person charged with having forged an obligation of the United States with intent to defraud, which is made an offense against the United States by Rev. Stat. Sec. 5414 (U. S. Comp. St. 1901, p. 3662), although he was at the time an officer of

(19) *Smith v. Shaw*, 12 Johns. (N. Y.) 257; *Echols v. Stanton*, 3 W. Va., 574.

(20) *Martin v. Wallace*, 40 Ga., 52.

LIABILITY OF OFFICERS.

the army, and the alleged offense was committed at a military post, and with intent to defraud an enlisted soldier, where the accused has since been discharged from the army without any action against him having been taken by the military authorities; there being no provision, either constitutional or statutory conferring exclusive jurisdiction on courts-martial to punish such offense. (21)

256. IN SUIT BY SOLDIER. In the case of a marine necessarily held on board ship after expiration of his term of enlistment the court said:

"An officer is not answerable for an injury done within the scope of his authority, unless influenced by malice, corruption, or cruelty, although he may have committed an error of judgment in the exercise of his discretionary authority. The officer is a public officer and his position is quasi judicial." (22)

(21) Neall v. United States, (1902,) 118 F., 699.

(22) Wilkes v. Dinsman, 7 How., (U. S.) 89, 12 L. ed., 618, holding that the burden of proof is on plaintiff to show that the officer exceeded his authority.

CHAPTER TWENTY-ONE.

LIABILITY OF ENLISTED MEN UNDER CIVIL LAW.

257. WHEN LIABILITY BEGINS. As has been heretofore shown, (1) enlisted men cannot be turned over to the civil authorities for trial, during their tour of duty, except in certain cases. But this does not interfere with the service of summons upon them in a suit for damages. A damage suit, however, is rarely brought against an enlisted man. He has built his nest upon the ground where the storm flies over him. In other words, the responsibility for his actions, under orders, is borne by his officers. And, except where the enlisted man is turned over to the civil authorities under the 59th Article of War, he is not, under martial law, likely to fall into the hands of the civil authorities until the restoration of order and determination of martial law powers. Moreover, under absolute martial law, the 59th Article of War could not apply.

258. GENERAL RULE. A soldier may justify under an order of his superior which does not expressly and clearly show its illegality on its face.

(1) See Secs, 90, 91 and 92.

(2) But a soldier is bound to obey only the lawful orders of his superior officers. An illegal order from a superior will not, of itself, always justify a wilful killing of another. (3) The question of legal status again arises. Orders given under martial law may be justifiable, when the same orders in time of peace would be manifestly illegal. A naval officer in command of a ship has no authority to direct a sentry on duty aboard the vessel to run through the body any man who shall abuse the sentry by words alone, however opprobrious, and if any such order should be given it would be unlawful and could not justify or excuse a homicide committed by the sentry under such circumstances. (4)

These qualifications to the rule first stated only mean that the enlisted man must bear in mind that the situation, in time of peace, does not permit the use of the same force that would be applied in time of war. Bearing the existing conditions in mind he will obey orders as first stated. He should obey orders unless he is *sure* they are unlawful.

259. SENTRIES. GENERAL RULE UNDER MILITARY LAW. The enlisted man, as a sentry, is

(2) *Riggs v. State*, 3 Colw. (Tenn.) 85, 91 Am. Dec., 272; *Com. v. Shortall*, 206 Pa. St., 165.

(3) *U. S. v. Carr*, 25 Fed. Cas. No. 14,732; 1 Woods, 480.

(4) *U. S. v. Bevans*, 24 Fed. Cas. No. 14,589.

LIABILITY OF MEN.

compelled to assume the offensive against both soldiers and civilians. As has been heretofore stated, his duties against soldiers are controlled by military law; against civilians, by martial law in time of insurrection and by military and civil law in time of peace. With reference to the liability of a sergeant of the guard for shooting another soldier, Judge Woods, afterwards of the supreme court of the United States, once charged a jury as follows:

“Place yourselves in the position of the prisoner at the time of the homicide. Inquire whether, at the moment he fired his piece at the deceased, with his surroundings at the time, he had reasonable ground to believe, and did believe, that the killing or serious wounding of the deceased was necessary to the suppression of a mutiny then and there existing, or of a disorder which threatened to ripen into mutiny. If he had reasonable ground so to believe, then the killing was not unlawful. But, if on the other hand, the mutinous conduct of the soldiers, if there was any such, had ceased, and it so appeared to the prisoner, or if he could reasonably have suppressed the disorder without the resort to such violent means as the taking of the life of the deceased, and it would so have ap-

peared to a reasonable man under like circumstances, then the killing was unlawful. But it must be understood that the law will not require an officer charged with the order and discipline of a camp or fort to weigh with scrupulous nicety the amount of force necessary to suppress disorder. The exercise of a reasonable discretion is all that is required." (5)

260. SENTRIES, GENERAL RULE IN AID OF CIVIL AUTHORITIES. The liability of sentries, when their commanding officer is acting strictly in aid of civil authorities, depends upon three things: First, the powers of the civil officer in command. Second, the special orders of the sentry. Third, the right of self-defense. (6)

If a statute of the state, in which service is being rendered, constitutionally invests the commanding civil officer with special riot powers; these powers may be executed, under special orders, by the sentry. (7) But the enlisted man need not be a constitutional lawyer. On receipt of his orders he should *think of what he has to do* to carry them out. If he concludes the orders are proper, under the

(5) U. S. v. Carr, 1st Woods, 480.

(6) On the first and third propositions, see chapter. 9.

(7) See Sec. 116.

circumstances, that conclusion justifies him in obeying the orders. It would, however, be well for the sentry to keep in mind the general distinction between felony and misdemeanor and not shoot a man, except in self-defense, where a misdemeanor only may be attempted. He should not use physical force against vocal violence; but as verbal abuse usually leads to overt acts, it would be the duty of the officer of the guard, under these circumstances, to use a patrol in clearing the vicinity of the post. This matter should be covered by the general directions of the civil officer.

261. SENTRIES, GENERAL RULE UNDER MARTIAL LAW. Special orders to sentries usually embody a rule as to when sentries shall fire. These orders, unless manifestly unlawful, may be safely carried out by the sentries. If they apply to strangers approaching a post, the warning, "Halt! or I fire!" should be used and repeated, except in cases of attempted surprise. With reference to these orders the Supreme Court of Pennsylvania, quoting from Hare's Constitutional Law, said:

"It is not less clear that although the justification must be based on necessity, and cannot stand on any other ground, it will be enough if the circumstances induce and justify the belief that an imminent peril exists, and cannot be averted

LIABILITY OF MEN.

without transcending the usual rules of conduct. For when the exigency does not admit of delay, and there is a reasonable and probable cause for believing that a particular method is the only one that can avert the danger, it will be morally necessary, even if the event shows that a different and less extreme course might have been pursued with safety." (8)

And the Supreme Court of the United States has also held that :

"It is the emergency that gives the right, and the emergency must be shown before the taking can be justified. In deciding upon this necessity, the state of the facts as they appear to the officer at the time he acted will govern the decision, for he must necessarily act upon the information of others as well as his own observation. And if, with such information as he had a right to rely upon, there is reasonable ground for believing that the peril is immediate and menacing or the necessity urgent, he is justified in acting upon it and the discovery afterwards that it was

(8) *Commonwealth v. Shortall*, 206 Pa. St., 165.

LIABILITY OF MEN.

false or erroneous will not make him a trespasser." (9)

262. **HABEAS CORPUS.** In a case heretofore repeatedly cited, an enlisted man killed a stranger, as related in section one hundred and sixty-two. His superior officers were exercising qualified martial law powers under the governor's order set out at section two hundred and eleven. On affidavit filed with a justice of the peace, this enlisted man, Wadsworth, was arrested after the return of his regiment from service. The charge was manslaughter. Wadsworth's officers petitioned the Supreme Court for a writ of *habeas corpus*, which was issued, and the court's final order in the *habeas corpus* proceeding was as follows:

"This court, either sitting as a committing magistrate or by virtue of its supervisory jurisdiction over the proceedings of all subordinate tribunals, has the authority and the duty on *habeas corpus*, in favor of a prisoner held on a criminal charge, to see that at least a *prima facie* case of guilt is supported by the evidence against him. In the relator's case the facts presented by the evidence are undisputed and on them the law is clear and settled. If

(9) Taney, C. J., *Mitchell v. Harmony*, 13 How., 115.

the case was before a jury, we should be bound to direct a verdict of not guilty and to set aside a contrary verdict if rendered. It is therefore our duty now to say that there is no legal ground for subjecting him to trial and he is accordingly discharged."

"The relator, Arthur Wadsworth, is discharged from further custody under the warrant held by respondent." (10)

263. TWICE IN JEOPARDY. Where a United States soldier killed a fellow soldier during a military encampment, and on being surrendered to the civil authorities of the state was prosecuted for murder, and acquitted, such acquittal, though a final determination of his innocence of murder and of each lesser offense necessarily included therein, was no bar to his subsequent military arrest and trial by a general court-martial for conduct to the prejudice of good order and military discipline, though based on the same act. (11)

(10) Com. v. Shortall, 206 Pa. St., 165.

(11) In re Stubbs, 133 Fed., 1012. Citing Cross v. North Carolina, 132 U. S., 139; Steiner's Case 6 Op. Atty. Gen'l., 413; Howe's Case, Id., 506.

CHAPTER TWENTY-TWO.

MILITIA IN UNITED STATES SERVICE.

264. LAWS AND REGULATIONS GOVERNING the federal service of militia have been indicated, throughout many of the preceding chapters, in connection with their various duties. (1) The Dick Act (2) specifically provides for the hasty mobilization and expeditious use of state troops in federal service. But before beginning these duties they become, for the time being, federal troops, by being mustered into, or receiving orders for, the federal service. (3)

(1) See, for military law, Secs. 1, 2, 3, 4, 10, 11, 12; for federal aid, Secs. 41, 42, 43, 53, 138, 141, 201; for federal service, Secs. 88, 89, 139, 169, 170, 178, 179, 217, 225, 227, 228; for liabilities, Secs. 241, 245, 246, 247, 249. See all titles of general application.

(2) Act of January 21st, 1903, 32nd Stat. L., 775.

(3) Sec. 7, *Id.* It has been held that a formal muster-in of an organization is not essential. Dig. Opin. J. A. G., 1901, par. 1726. The calling forth of the militia into the U. S. service is an administrative function, a ministerial act, in which the secretary of war may issue the necessary orders as the organ of the executive; and his act is the act of the president. *Id.*, par 1725.

265. STATUTORY AUTHORITY FOR. Section four of the Dick Act authorizes the president to use the organized militia in federal service, for periods not exceeding nine months each, whenever he is unable, with the other forces at his command, to repel invasion, subdue rebellion, or execute the laws of the union in any part thereof. (4)

266. HOW SELECTED. The president, deciding to use militia, may authorize the governor of a state to designate which troops shall so serve. The governor's act under this authority becomes the act of the president; and troops so selected by the governor are legally selected by the president. (5)

When the president desires to use the militia in federal service he may exercise full discretion as to what troops shall be chosen. The statute recites that he may apportion them among the states and territories or to the District of Columbia, according to representative population. (6) Were conditions equal this method might be adopted. But if, for any reason, the president decides to use the troops from one or more states to the exclusion of others, his authority to do so is unquestioned. There are many reasons why this should be so, but the

(4) Sec. 4, Act of January 21, 1903, (32 Stat. L. 776.)

(5) Dig. Opin. J. A. G., 1901, 1727.

(6) Sec. 6, Act of January 21, 1903, 32 Stat. L. 776.

most important one is, probably, that troops in the disaffected district have been, or are, in service under orders of the governor. It may, on rare occasions, happen that troops in the disaffected district are tainted by the same lawless spirit which has caused the disturbance or, for other reasons, cannot act with the same whole-hearted interest in the national welfare that will be displayed by troops from other states. Furthermore, it will often happen, that the equipment of some state troops, owing to the indifference of the state legislature, will not be in such condition as to make a sudden call expedient. This last reason should result in a common feeling of shame throughout the state where it existed, if it prohibits the state troops from assisting the national government in maintaining the integrity of the nation. But a discussion of the questions which arise because of this condition is inopportune. It may be said, however, that this indifference to responsibility shows that General George Washington, our first president, put too much faith in the general patriotism of his countrymen when he said: (7)

“There can be little doubt that Congress will recommend a proper peace establishment for the United States, in which due attention will be paid to the importance

(7) Arms and the Man, issue of February 21, 1907.

of placing the militia of the Union upon a regular and respectable footing. * * * The militia of the country must be considered as the palladium of our security, and the first effectual resort in case of hostility. It is essential, therefore, that the same system should pervade the whole, that the formation and discipline of the militia of the continent should be absolutely uniform."

The remedy for these inequities is for Congress to take full control of the organized militia, under the federal constitution, and thus, indirectly, require each state to do justice to its own force.

267. PAY AND PENSIONS IN FEDERAL SERVICE.

The pay of officers and enlisted men, of the militia in federal service, is the same as that of the regular army in corresponding grades. The allowances are also the same. (8)

In state service a militiaman, when injured or wounded, may rely only upon the justice of the succeeding legislature for compensation. There may be an exception in a case where he can pick out certain responsible members of a mob and sue them for damages under the civil laws. This is rarely

(8) Sec. 10, Act of January 21, 1903, 32 Stat. L., 776.

attempted for obvious reasons. He cannot sue the state. The most that he may do is to petition a legislature which may or may not have been friendly to the cause in which he suffered. The personal representatives of a guardsman who has been killed in such service have only the same rights, or lesser ones. But in federal service the militiaman obtains the benefit of those beneficent laws which Congress has provided in compensation to the men who have suffered for the benefit of the nation. (9)

268. COMPANY MINIMUM ACCEPTED. The statute provides that the president may fix the minimum number of enlisted men in each company of the organized militia in time of peace. This has been construed to mean that the president may refuse to accept any company, or other specified unit, for federal service, which has a numerical strength below a minimum fixed by him. (10)

269. OFFICERS. Organizations of the national guard shall correspond to those of the regular army by January 21st, 1908. (11) This provision probably means, in part, that the guard would be accepted by regiments from the various states, fol-

(9) Sec. 22, Ib.

(10) Sec. 3, Act of January 21, 1903, 32 Stat. L., p. 775. This minimum was first fixed by G. O. No. 3, A. G. O., 1907.

(11) Sec. 3, Act of January 21, 1903, (32 Stat. L., 775.)

U. S. SERVICE.

lowing the custom heretofore established. An older congressional provision seems to require the president to accept such organizations with their officers from the colonel to second lieutenant inclusive. (12) Questions arise as to whether or not the president, in the event of a general call, would accept the state organizations greater than regimental. There is probably no legal requirement directing the president to accept such organizations other than that he must accept the regiments and separate battalions composing them.

It therefore follows that when militia are mustered into federal service they are accepted as fully organized and officered regiments or smaller units. (13)

270. STATE PROPERTY. Regiments mustered into the service of the United States will always be required to take property for which certain of their officers are responsible to their respective states. Other property will be issued to them, for which they are responsible to the federal government. It is manifest that the returns for these two classes of property must be kept separate unless orders are

(12) Sec. 3, Act of April 26th, 1898.

(13) Officers of the national guard cannot be commissioned by the president without a violation of the federal constitution, which: "reserves the appointment of the officers to the states respectively." Dig. Opin. J. A. G., 1901, par. 1734.

otherwise issued. Much of this so-called state property really belongs to the federal government. It is charged to the state, and by the state to the officer. A plan may be devised whereby the federal government will take the state property on such occasions. Such a plan would save subsequent confusion and enable the officers, responsible for public property, to dispense with one set of returns. At the inception of the Spanish War much public property theretofore charged to the states was lost because the state militia officers, mustered in as volunteers, did not thereafter consider themselves responsible to the states and did not, in the hurried concentration camps, find time to collect and care for the state property. They were too busy learning their new duties.

271. HORSES. Some general plan will probably be adopted whereby mounted officers may procure horses from the U. S. quartermaster's department whenever militia is mustered into the federal service. This is advisable because the horses should conform to federal specifications in order to be serviceable. It will, moreover, avoid the necessity for the transportation of horses with each regiment which has been ordered to the general rendezvous. Unless a general order, under some such plan, has been issued, some infantry field and staff officers will be on foot, some on mares and some on geldings

U. S. SERVICE.

equally objectionable. This lack of uniformity will be due to hasty mobilization and to the doubt as to whether or not horses will be needed. In riot duty in cities, on state service, it is not the custom to take horses except for cavalry.

CHAPTER TWENTY-THREE.

REPORT OF TOUR OF DUTY.

272. **REPORTS ARE HISTORICAL DETAILS.** It is manifest that the details of past occurrences are easily forgotten and confused. It is therefore of importance that a record should be kept, somewhere, of each event which may afterwards be needed as testimony, as history, as a precedent, or as a corroborative basis for other testimony. For these reasons a record of the events and transactions of each tour of riot duty is required of and made by the commanding officer. This record is filed in the form of a report and is often of great importance with relation to the aftermath of riot duty.

273. **GENERAL REQUIREMENTS.** These reports usually begin with a copy of, or reference to, the orders under which the troops were called into service. They then state concisely the following details:

1st. A description of the units composing the force, where such description is not included in the orders.

2nd. The times of the movements of the various units, such as companies traveling separately. Orders to these units may be set out or attached.

REPORT OF TOUR OF DUTY.

3rd. A statement of the information acquired, as to the progress of the trouble, up to the time of the arrival of troops.

4th. Orders from civil authorities, if any.

5th. Details of first disposition of troops with orders issued therefor.

6th. Proclamations issued, if any.

7th. Conduct of the mob, first day.

8th. Subsequent orders, if any, from civil authorities, first day.

9th. Orders to staff officers.

10th. Details of the action of troops, first day.

The insertion of proper dates serves, afterward, in fixing dates as to other matters. The report is continued by recording important events and orders; but the first day's record is usually fuller than the succeeding ones when troops are coping with the ordinary riot. The commanding officer may direct someone to keep this record of events. He may dictate it each evening to a stenographer, detailed as clerk. The importance of keeping a record up to date is realized when an officer on return home is required to sit down, exhausted from riot duty, and make at one time a detailed report of two weeks' service.

274. STAFF REPORTS. A commanding officer may require each staff officer to make to him a formal report and these will be attached to the general report of the commanding officer. They are cor-

REPORT OF TOUR OF DUTY.

roborative of the general report and include minor transactions which need not be mentioned in it, but may become important.

275. **MEDICAL OFFICER'S REPORT.** The report of the chief medical officer is important as evidence in future claims against the government. It should therefore be prepared with a view to these claims upon it and be accompanied by certificates or affidavits as to important cases. It should contain definite references to the sick report books, to save subsequent confusion.

276. **COMMISSARY OFFICER'S REPORT.** In state service the senior commissary officer will report the reasons for not following the regulations in the purchase of emergency subsistence, if any. His report will cover all unusual transactions which need further explanation than that shown on his regular returns.

277. **QUARTERMASTER'S REPORT.** This report should check with the commanding officer's reports as to the movements of troops, and cover details of movements which may subsequently become important but are not shown in the general report. In other matters the report is similar to the commissary officer's report, except that it treats of different property, and of quarters.

278. **SUMMARY COURT OFFICER'S REPORT** may be on the usual form. If this officer is also detailed as provost marshal, his judicial duties with relation

REPORT OF TOUR OF DUTY.

to enlisted men and civilians will be reported separately.

279. JUDGE ADVOCATE'S REPORT. A judge advocate will hardly be detailed except in service of a considerable force for some duration of time. Under these circumstances some degree of martial law is usually exercised and the same officer may well be a provost officer and a judge advocate. His transactions under military law will be reported separately from those under martial law.

280. UNDER MARTIAL LAW. The commanding general's report usually consists of a summary of the duty, with references to the detailed reports of his various assistants.

281. FAIRNESS to other officers, in reports, is almost as important as exactness. A supreme test of civilized man is to intrust him with unusual powers and, at the conclusion of their exercise, to observe whether or not he has allowed his judgment to be perverted by bias or prejudice. In an emergency requiring the hasty performance of new duties, officers sometimes betray irritability solely because of a nervous desire to have everything right. These exhibitions of seeming harshness are more often due to physical than to mental defects. They should never be permitted to interfere with that cordiality between officers which is so necessary to a proper *esprit de corps*.

INDEX.

REFERENCES ARE TO SECTIONS.

ABSOLUTE MARTIAL LAW,

- defined, 192.
- exercise of, 203.
- habeas corpus under, 226, 227.
- principal rules stated, 204.
- tactical use of troops under, 186.

ADVANCE GUARD,

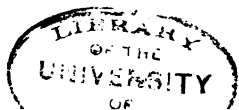
- for street work, 158.

AFFRAYS,

- defined, 107.

AID OF CIVIL AUTHORITIES,

- authority of military officers, 94.
- civil officers close saloons, 150.
- civil officers should confer full powers, 105.
- discretionary powers of military officers, 110.
- federal troops act independently, 139.
- felonies and misdemeanors, 98.
- firing on mob, 112.
- liability of officers, 242.
- liability of sentry in, 260.
- liability of soldier to arrest, 90, 91, 92.
- military discretionary powers limited, 95.
- officer's discretionary powers, 183, note.
- orders in general, 66.
- order to fire, 65.
- private property, 229.
- state statutes control tactics, 116.



INDEX, REFERENCES TO SECTIONS.

tactical use of troops in, 182, 183.
territorial limits, 117.
troops may act in self defense, 96.
who may call troops, 52, 53, 54, 55, 56.
writ of habeas corpus not suspended, 220.

AMMUNITION,

emergency supply kept on hand, 20.
multiball for street service, 20.
officer placed in charge of, 20.

AMUSEMENT HALLS,

regulation of, 154.

APPEAL,

to governor, for orders, when, 57.

ARMED POLICE,

when militia act as, 95.

ARMY,

constitution distinguishes it from militia, 1.
defined, 1.
militia is not, 1.

ARREST,

after escape, 102.
by civil authorities, 90, 91, 92.
by civil officers, for felonies, 100.
civil, for an affray, 107.
civil, when liable to, 90, 91, 92.
for felony, force used for, 100.
for misdemeanor, by civil officer, 103.
for misdemeanor, force used in making, 104.
homicide when rioter resists, 114.
liability to, when aiding civil authorities, 90, 91,
92.
power to, by civil authorities, 98 et seq.
what constitutes presence or view, 109.

INDEX, REFERENCES TO SECTIONS.

- ARRIVAL OF TROOPS,
civil authorities will be advised of, 66.
- ARTICLES OF WAR,
apply to militia in federal service, 9.
as applied to state troops in state service, 9.
- ARTILLERY,
first disposition of, 166.
use of prolongs, 166.
- ASSEMBLY,
of troops before receipt of orders, 44 et seq.
regulations requiring, 45.
- ATTACK,
by mob, resisting, 111.
- ATTEMPTED FELONY,
arrest for, by civil officers, 100.
- BAGGAGE,
preparation of, 88.
- BAGGAGE AND STORES,
cook outfit kept packed, 22.
- BARRICADES,
construction of, 163.
- BAYONET,
exercises, drill in, 23.
used to disperse mob, 159.
use of, 187.
- BILLETING TROOPS,
prohibited, 173.
- BLANK CARTRIDGES,
should not be used, 188.
- BREACH OF THE PEACE,
defined, 108.

INDEX, REFERENCES TO SECTIONS.

- CALL FOR TROOPS,
 - laws governing, 25.
 - occasions classified, 35.
 - should be in writing, 56.
 - when made, 25 et seq.
- CAMP,
 - followers, 8.
- CAMP SITES,
 - taking ground for, 236.
- CANVAS,
 - use of, 174.
- CARTRIDGES,
 - emergency supply kept on hand, 20.
 - multiball for street service, 20.
- CAVALRY,
 - first disposition of, 165.
 - tactical use of, 165.
- CAVALRY HORSES,
 - drill of, 23, 165.
- CENSORSHIP,
 - of theaters, etc., 154.
- CHURCHES,
 - how protected, 204.
- CIVIL AUTHORITIES,
 - acting independently of, 133.
 - actual attendance of, 65.
 - are all under direction of governor, 127.
 - arrest by, when in aid of, 90, 91, 92.
 - arrest of, 132.
 - cannot delegate their powers to military commander, 183, note.
 - certain, may call out troops, 55.

INDEX, REFERENCES TO SECTIONS.

conference with officer, 71.
control troops acting in their aid, 97.
co-operation with, 118, 120.
disarmed in emergencies, 134.
disputes between, 118.
duty of, as to public meetings, 153.
duty of, as to saloons, 151.
duty to prevent riot, 37.
duty to suppress riot, 38.
form of order for troops by, 60, 61.
functions of, exercised by military commander,
 under martial law, 203.
governor may overrule, 67.
governor's powers over, 127.
importance of prompt decision, 40.
may call for troops, when, 35.
may call only certain troops, 56.
may decide when troops should be called, 30.
may not permit violation of law, 36.
may tell state troops what to do but not how to
 do it, 183.
may use military force, when necessary, 37.
orders by, should be in writing, 59, 65.
permitting violation of statutes, 212.
playing politics, 74.
powers of in making arrests, 98 et seq.
prevention of crime by, 106.
reinstating, 134.
report progress of disturbance, 66.
required to enforce laws, 36.
rivals, governor decides, 126.
should confer full powers, 105.
should inform governor of disturbances, 54.

INDEX, REFERENCES TO SECTIONS.

- should keep governor advised, 64.
- should meet troops, 81.
- sympathy with insurrection, 39.
- CIVIL COURTS,
 - under martial law, 206.
- CIVILIANS,
 - accompanying troops, 8.
 - certain, given permits at night, 156, 157.
 - conduct toward, 76.
 - justifiable homicide by, 113.
 - with troops, control of, in time of war, 8.
- CIVIL LAW,
 - definition of, as used in text, 195.
- CIVIL OFFICERS,
 - conduct of military toward, 74.
- CITIZENS,
 - separating from mob, 123.
- CLOSING SALOONS,
 - statutes relating to, 149.
- COMMANDER,
 - dual powers of, 6.
 - scope of powers, 7.
- COMMANDING OFFICER,
 - action of, under conflicting orders, 118.
 - conflicting orders to, 57, 58.
 - control of, by civil authorities, 97.
 - co-operates under qualified martial law, 122.
 - co-operating with civil authorities, 120.
 - discretionary powers of, aid of civil authorities, 110.
 - duty as to saloons, 149, 150, 151, 152.
 - federal, discretionary powers, 246.
 - first orders of, 63.

INDEX, REFERENCES TO SECTIONS.

governor may delegate military powers to, 129.
has limited powers in aid of civil authorities, 95.
his powers in aid of civil authorities, 94.
jurisdictional limits in state service, 117.
keeps open communication with governor, 64.
may act in self defense, 96.
may construct barricades, 163.
obtaining powers from civil authority, 105.
orders of, as to safeguard, 162.
pays for property destroyed by his men, 83.
personal conduct of, 79.
plans with reference to source of orders, 168.
reports where, to civil officer, 81.
required to resort to qualified martial law, 119.
responsibilities of, 124.
separates citizens from mob, 123.
should acknowledge receipt of orders, 62.
should be attended by civil officer, 65.
should detrain at distance from mob, 82.
should require written orders, 59, 60.
use of machine guns by, 164.
warns before firing, 204.

COMMISSARIES,

duties in federal service, 169, 170.
U. S. manual for, 89.

COMMISSARY'S REPORT,

tour of duty, 276.

COMPANY COMMANDERS,

discretion as to assembling troops, 46.
form of his notice to men, 17.
must guard armory, 47.
notifying men for riot duty, 16.
orders of, 63.

INDEX, REFERENCES TO SECTIONS.

- COMPENSATION,
 - for private property taken or injured, 238.
- CONCURRENT,
 - martial and civil law, 124.
- CONDUCT OF MEN,
 - preparing for riot duty, 50.
- CONDUCT OF OFFICERS,
 - exercising qualified martial law, 78.
 - in preparation, 71.
 - in preparation for riot duty, 49.
 - personal, 79.
- CONDUCT TOWARD CITIZENS,
 - of soldiers, 76.
- CONDUCT TOWARD MOB,
 - of officers, 77.
- CONDUCT TOWARD TROOPS,
 - of officers, 75.
- CONFLICTING ORDERS,
 - governor should adjust, 67.
 - governor supreme, 67.
- CONFLICT OF ORDERS,
 - appeal to governor, 57, 58.
 - two governors for one state, 58.
- CONGRESS,
 - may prescribe discipline for militia, 9.
- CONSTITUTION,
 - guarantee of the federal, 41.
 - U. S., distinguishes army from militia, 1.
- CONSTITUTIONAL PROVISIONS,
 - federal, as to habeas corpus, 217.
 - govern call of troops, 25.
- CONSTITUTIONS,
 - are the highest laws of the states, 28.

INDEX, REFERENCES TO SECTIONS.

- give governor power to decide emergencies, 28.
- make governor chief executive, 29.
- powers of civil authorities under, 37.
- state, govern calls for troops, 52.
- state, provide when troops are called, 25.
- used to determine legal questions, 72.
- CONTEMPT OF COURT,
 - by militia officer, 242.
- CONTRACTORS,
 - civilian, with troops, 8.
- CO-OPERATIVE MARTIAL LAW,
 - defined, 119, 193.
 - exercise of, 209.
 - habeas corpus under, 222, 225.
 - may be resorted to, 119.
 - tactical use of troops under, 185.
- CORRESPONDENTS,
 - with troops, 8.
- COSSACK POST,
 - at armory, 47.
 - for safeguards and outposts, 189.
- COURT OF CLAIMS,
 - functions of, 238.
- COURTS OF JUSTICE,
 - military commissions are, 178.
- CRIME,
 - prevention of, 106.
- CROPS,
 - destruction of, 235.
- CURFEW,
 - regulations, 156.
- CUSTODIAN,
 - of military district property, 233.

INDEX, REFERENCES TO SECTIONS.

- CUSTOMS OF THE SERVICE,
 - defined, 12.
 - legal force of, 12.
- DEPLOYMENT,
 - before encountering mob, 159.
- DESTRUCTION OF CROPS,
 - to prevent, etc., 235.
- DESTRUCTION OF PROPERTY,
 - fixing responsibility for, 161.
 - liability for, 73.
 - preventing, 161.
 - prohibited, except under military necessity, 204.
- DETRAINING,
 - at distance from mob, 82.
- DICK ACT,
 - act of January 21, 1903, 9.
 - gave state forces constitutional rights, 9.
- DISCIPLINARY,
 - punishments defined, 5.
- DISCIPLINE,
 - defined, 5.
 - enroute, 83.
 - prescribed by congress, 9.
- DISLOYAL CITIZENS,
 - classified, 197.
- DOMESTIC DISTURBANCES,
 - suppression of by president, 42.
- DORR REBELLION,
 - rival governors, 126.
- DRILLS,
 - for cavalry horses, 23.
 - preparatory, 23.

INDEX, REFERENCES TO SECTIONS.

- DUAL POWERS,
 - of commander, 6.
- EMERGENCY BOARD,
 - state, for expenses of riot duty, 177.
- EMINENT DOMAIN,
 - taking property under military necessity is not exercise of right, 232.
- ENCAMPMENTS,
 - taking ground for, 236.
- ENCOUNTER,
 - with mob, 159.
- ENLISTED MEN,
 - as scouts, 80.
 - care of, 75.
 - conduct of, in preparation for duty, 50
 - disciplinary punishment of, 83.
 - liability under civil law, 257 et seq.
 - may be taken from civil authority on habeas corpus, 262.
 - property of, lost, 239.
 - subsistence, awaiting call, 51.
 - suing officer in civil courts, 256.
 - when liability to civil law begins, 257.
- EQUERIES,
 - for mounted officers, 176.
- EQUIPMENT,
 - posting order as to, 21.
 - preparation of, 21.
- ESCAPE,
 - arrest after, 102.
- FAIRNESS,
 - to officers, in reports, 281.

INDEX, REFERENCES TO SECTIONS.

FAMILY RIGHTS,

always protected, 204.

FEDERAL AID,

application for, 43.

federal statutes control tactical regulations, 179.

form of order to troops, 139, note.

statutes relative to, 42.

use of federal militia, 41.

FEDERAL SERVICE,

state court writ of habeas corpus suspended, 228.

FEDERAL TROOPS,

control of, 139.

custom as to co-operation, 139.

do not act under orders of civil authorities, 139.

militia are, in federal service, 178.

FELONIES,

arrest for, by civil officers, 100.

defined, 98.

force used to arrest for, 101.

FIELD DESK,

kept ready for service, 22.

FIRING ON CIVILIANS,

who force dead line, 162.

FIRING ON MOB,

in aid of civil authorities, 112.

FIRING ON RIOTERS,

by advance and rear guards, 158.

FIRST DISPOSITION OF TROOPS,

general plan, 168.

FOOTNOTES,

authority of, 69.

INDEX, REFERENCES TO SECTIONS.

- FORFEITURE OF ESTATE,
warning as to, 147.
- FORM OF NOTICE,
to assemble for riot duty, 17.
- FORM OF ORDERS,
for troops, 60, 61.
- FORM OF PROCLAMATION,
by governor, establishing martial law, 142.
by governor, establishing qualified martial law,
211.
by military district commander, 144.
by president, in domestic disturbance, 141.
- FORM OF RETURN,
on writ of habeas corpus, 223.
- FRAUDS IN SERVICE,
liability of officers for, 255.
- GOVERNOR,
acting independently of civil authorities, 122.
acts when minor authorities fail, 39.
cannot be subpoenaed, 240.
cannot delegate his powers to civil authorities,
127.
civil authorities may ask him to call troops, 57.
communication with, 64.
controls other state civil authorities, 55.
decides disputes between civil officers, 118.
decides when troops shall be called, 127.
duties of, in paying state troops, 177.
establishing military commissions, 136.
form of his order for troops, 60, 211.
governed by state constitution, 25.
has full powers in insurrection, 128.

INDEX, REFERENCES TO SECTIONS.

has highest executive powers, 29.
his official duties not controlled by courts, 240.
his orders protect officer, 240.
importance of prompt decision, 40.
in suppressing insurrection, is accountable to no one, 128.
may act summarily, 128.
may apply for federal aid, 41, 42.
may arrest civil officer, when, 132.
may compel civil authorities to enforce laws, 36.
may delegate martial law powers to military commander, 129.
may disarm civil officers, 134.
may order out troops, when, 35.
of territory, exercising martial law, 202.
order of, establishing qualified martial law, 211.
order of, for emergency subsistence, 171.
powers in insurrection, 127.
power to call out troops, 52, 53.
preventing prize fight, 36.
proclamation by, in insurrection, 142.
recitals in his proclamation cannot be disputed by courts, 143.
resorting to qualified martial law, 119.
should issue written orders, 59, 60.
should not call troops under unconstitutional laws, 27.
state secrets, 240.
statutes cannot strip him of constitutional powers, 127.
terminates martial rule by proclamation, 148.
using troops, removes constitutional limitation, 127.

INDEX, REFERENCES TO SECTIONS.

who is, decided by president, 141.

GRAND JURY,

cannot secure state secrets from officer, 240.

GUARDS,

for armories, when, 47.

HABEAS CORPUS,

defined, 218.

federal constitutional provisions, 217.

form of return on writ, 223.

governor's proclamation settles questions of fact,
143.

illustration of suspension of writ, 224.

proclamations suspending writ, 142, 144.

reference to general rules, 125.

suspended as effect of proclamation, 224.

suspension of writ defined, 219.

under absolute martial law, 226, 227.

under co-operative martial law, 222, 225.

under qualified martial law, 221.

used by officers for enlisted men, 262.

writ not suspended in aid of civil authorities, 220.

HOMICIDE,

in making arrest for felony, 101.

in riot duty, justified by state statutes, 116.

in self defense, 96.

justifiable, by civilians, 113.

when rioters resist arrest, 114.

HORSES,

drill of, 23.

for militia officers in U. S. service, 271.

use of cavalry, 165.

HOSPITALS,

how protected, 204.

INDEX, REFERENCES TO SECTIONS.

- HOSPITAL STORES,
 - may be needed early, 167.
- HOSTILE ACTS,
 - in time of peace, 117.
- INFORMATION,
 - obtaining, from prisoners, 77.
 - use of scouts for, 80.
- IN PARI DELICTO,
 - rule applied in rebellion, 254.
- INSPECTION,
 - of firing pins of rifles, 20.
 - of private weapons, 50.
- INSURGENTS,
 - commanded to disperse by president, 42.
 - giving aid and comfort to, 198.
 - status of, 197.
 - sympathy with, 197.
- INSURGENTS ARE ENEMIES,
 - qualification of the rule, 197.
- INSURRECTION,
 - aided by minor civil authorities, 39.
 - becomes rebellion, when, 32.
 - control of federal troops, 139.
 - defined, 32.
 - duty of the president, 42.
 - establishing military commissions, 136.
 - formerly probably meant rebellion, 217.
 - form of governor's proclamation, 142.
 - form of president's proclamation, 141.
 - governor's decisions as to, cannot be questioned, 127.
 - governor's powers are absolute in, 128.
 - military district proclamation, 144.

INDEX, REFERENCES TO SECTIONS.

- obtaining information in, 77.
- requiring exercise of martial law, 196.
- INTERPRETATION OF LAWS,
 - definitions, 31.
- INTERURBAN CARS,
 - use of, 85.
- JUDICIAL DECISIONS,
 - furnish rules for conduct, 13.
- JURISDICTION,
 - of military commissions, 136, 137.
- JUDGE ADVOCATE'S REPORT,
 - tour of duty, 279.
- KILLING,
 - see homicide.
- KITCHENS,
 - preparation of, 22.
- KRAG JORGENSENS,
 - inspecting firing pins of, 20.
- LAW,
 - see Constitutions, Customs of the Service, Martial Law, Military Law, Regulations.
- LAWS,
 - calling troops, must be constitutional, 27.
 - unconstitutional, enforcement of, 26.
- LEASE,
 - of public property, by military government, 233.
- LEGAL QUESTIONS,
 - decision of, 71.
- LEGAL STATUS,
 - important to know, 246.
 - of troops, more easily ascertained in federal service, 178.

INDEX, REFERENCES TO SECTIONS.

LEGISLATURE,

of state may apply for federal aid, 41, 42.

LIABILITY OF CITY,

for property destroyed in riot, 73.

LIABILITY OF COUNTY,

for property destroyed in riot, 73.

LIABILITY OF ENLISTED MEN,

to both military and civil law, 263.

to civil law, begins when, 257.

to civil law, general rule, 258.

LIABILITY OF OFFICERS,

English rule, 244.

for frauds in service, 255.

for necessities for troops, 251.

for property strategically destroyed, 252.

for trespass by subordinate, 253.

for unnecessary violation of statute, 250.

how avoided, 241.

in aid of civil authorities, 242.

in mistaking legal status, 246.

in suit by soldier, 256.

martial law, federal service, 247, 249.

martial law, state service, 248, 249.

may be under both military and civil law, 255.

protection of president's order, 245.

under qualified martial law, 244.

LYNCHING,

preventing a, 160.

MACHINE GUNS,

co-operation with should be taught, 23.

disposition of, 164.

INDEX, REFERENCES TO SECTIONS.

MAILS.

obstructing, may constitute an insurrection, when,
196, note.

MARCHES,

concealing force on, 84.
through city streets, 158.

MARTIAL LAW,

absolute, application of civil law, 206.
absolute, application of customs of war, 192.
absolute, defined, 192.
absolute, principal rules of, 204.
absolute, taxes, 204.
absolute, what it suspends, 204.
absolute, what laws are enforced, 192.
absolute, written rules proclaimed, 192.
administration of, 207.
advisability of proclamation, 130.
American contrasted with continental, 199.
civil courts under, 206.
closing saloons under, 152.
control of railways, 204.
co-operative, defined, 193.
co-operative, when exercised, 193.
defined, 3, 191, 192, 193, 194.
degrees of, 191.
different from military government, 3.
duties of quartermaster, 175.
elasticity of, 198.
establishing military commissions, 136.
establishing qualified, 211.
establishing without proclamation, 122, 130, 131.
exercised only in home territory, 3.
exercise of absolute, 203.

INDEX, REFERENCES TO SECTIONS.

exercise of co-operative, 209.
exercise of qualified, 210.
federal military officer's powers, 246.
form of military district proclamation, 144.
general penalties, 204.
governor has absolute powers, 127, 128.
governor's powers, 200.
growing out of aid to civil officers, 119.
is co-operative or absolute in federal service, 193.
leasing public property under, 233.
liability of sentries under, 261.
may utterly overthrow civil law, 198.
military occupation necessary to, 204.
necessity for decided by chief executive, 199.
powers must not be exercised in peace, 246.
president's powers, 201.
proclamation of governor, 142.
qualified, 119.
qualified, defined, 194.
qualified distinguished from co-operative, 211.
qualified, when exercised, 194.
reports of tour of duty, 280.
restraint on vicious exercise of, 199.
rules proclaimed in district, 144.
safe conducts under, 213.
supplements existing civil law, 124.
terminated by proclamation, 148.

MAYOR,

may call out troops in his city, 56.
reading riot act, 145.

MEDICAL DEPARTMENT,

first duties of, 167.

INDEX, REFERENCES TO SECTIONS.

MEETINGS,

public, prohibited, 153.

MILITARY,

shall be subordinate to civil power, 13.

MILITARY COMMANDER,

advising civil officer, 71.

district proclamation, 144.

orders of, as to safeguards, 162.

prohibits public meetings, 153.

receiving conflicting orders from civil officers,
118.

regulation of saloons by, 152.

terminates martial rule by proclamation, 148.

MILITARY COMMISSIONS,

duties of, 207.

establishing, 136.

jurisdiction of, 136, 137.

number of officers composing, 136, note.

validity of decisions of, 137.

MILITARY GOVERNMENT,

defined, 3.

exercised only in foreign territory, 3.

MILITARY LAW,

customs of the service are, 12.

defined, 3.

governs camp followers in time of war, 8.

liability of sentry under, 259.

minor sources of, 10.

primary source of, 9.

relative force of statutes and regulations, 10.

MILITARY OFFICERS,

discretionary powers, aid of civil authorities, 110.

INDEX, REFERENCES TO SECTIONS.

MILITIA.

- active, is national guard, 2.
- constitution distinguishes it from army, 1.
- defined, 1.
- is not army, 1.
- officer impressing civilian's horse, 231.
- powers in aid of civil authorities, 95.
- who may call out, 52, 55.

MINISTERIAL DUTIES,

- of troops in aid of civil authorities, 97.

MINISTERS,

- aid of, etc., 155.

MINORS,

- over 18, must serve if enlisted, 70.
- over 18, not controlled by father, 70.

MISDEMEANOR,

- arrest for, by civil officer, 103.
- defined, 98.
- force used in making arrest for, 104.

MOB,

- conduct toward, 77.
- danger of timid policy with, 168.
- defined, 33.
- effect on, of assembling troops, 46.
- examining members of, 77.
- firing on, in aid of civil authorities, 112.
- firing on unresisting members of, 112.
- formation of, prevented, 37.
- given time to disperse, 159.
- marching on, 158, 159.
- preventing a lynching by, 160.
- prevention of damage by, 38.

INDEX, REFERENCES TO SECTIONS.

- protecting public property from, 47.
 - rebellious, 34.
 - resisting attacks by, 111.
 - separating rioters from citizens, 123.
 - threats to, 112.
 - troops should not detain near, 82.
 - use of bayonet to disperse, 187.
- MONEY,
- public, used for purchase of supplies for troops, 233.
- MOUNTED OFFICERS,
- servants for, 176.
- MOVEMENT OF TROOPS,
- scouts, 80.
- MURDER,
- killing non-resisting rioter is, when, 178.
- NAPOLEON,
- first fame of, gained in riot duty, 168.
- NATIONAL GUARD,
- is militia, 2.
 - who may call out, 52, 55.
- NECESSARIES,
- for troops, how procured from civilians, 231.
- NEWSPAPER,
- correspondents, with troops, 8.
- NOTICE,
- form of, for riot duty, 17.
 - general, for riot duty, 18.
 - service of, for riot duty, 16.
- NOTIFYING MEN,
- duties of company commander, 16.
 - for riot duty, 16.

INDEX, REFERENCES TO SECTIONS.

OBSTRUCTING MAILS,

may occasion insurrection, when, 196, note.

OFFICER,

given charge of ammunition, 20.

must not disclose official transactions, 240.

use of sword by, 187.

OFFICERS,

avoid liability by securing proof, 241.

conduct of, 71 et seq.

conduct in preparation for duty, 49.

discretionary powers, federal service, 246.

fairness in reports, 281.

liability of, under civil law, 240 et seq.

military, powers in aid of civil authorities, 94.

mounted, servants of, 176.

must not betray nervousness, 49.

personal conduct of, 79.

property of, lost, 239.

protected by governor's orders, 240.

provost, 216.

when ministerial duties only may be performed.
97.

OPPRESSIVE ACTS,

liability for, 243.

ORDER AT NIGHT,

maintaining, 157.

ORDERS,

acknowledging receipt of, 62.

assembly before receipt of, 44.

as to baggage and stores, 22.

as to barricades, 163.

as to clearing streets at night, 156.

INDEX, REFERENCES TO SECTIONS.

as to equipment, 21.
book for, 60.
by civil authorities, form of, 60, 61.
cautionary, for riot duty, 48.
conflicting, for service, 57, 58.
disarming civil authorities, 134.
establishing military commissions, 136.
establishing qualified martial law, 211.
first, of commanding officer, 63.
for assembly before call, 44 et seq.
forbidding sale of fire arms, 134.
force of, as military law, 10.
for co-operation of federal troops, 139, note.
for emergency subsistence, 171.
for machine guns, 164.
for safeguard, 162.
for troops, forms of, 60, 61.
in aid of civil authorities, 65.
interpretation of, 69.
of civil authorities, when in aid of, 95.
of company commander, 63.
of governor control, when, 55.
of governor protect officer, 240.
of president, protection afforded by, 245.
prescribing duties of provost marshals, 215, note.
procuring, when waiting for call, 51.
protection of, 68.
reinstating civil officers, 135.
separate, to soldiers and civilians, 66.
should be in writing, 59.
to advance and rear guards, 158.
to mob to disperse, 159.

INDEX, REFERENCES TO SECTIONS.

- to oust civil authorities, 132, 133.
- validity of, 242.
- ousting civil authorities,
 - governor's powers, 127.
- outposts,
 - Cossack posts for, 189.
- packing boxes,
 - sizes of, 88.
- patrol wagons,
 - used by reserve, 190.
- pay,
 - of troops in state service, 177.
- peace officers,
 - powers of, to make arrests, 99.
 - reading riot act, 145.
 - who are, 99.
- permits,
 - to certain civilians at night, 156, 157.
- personal property,
 - of prisoners of war, 204.
- picket posts,
 - for guarding large areas, 190.
- pillage,
 - always absolutely prohibited, 204.
- places of amusement,
 - regulation of, 154.
- police powers,
 - when exercised in aid of civil authorities, 95.
- postliminy,
 - doctrine of, 233.
- powers,
 - dual, of commander, 6.
 - scope of commanders, 7.

INDEX, REFERENCES TO SECTIONS.

PREPAREDNESS,

- cautionary orders, 48.
- co-operation with machine guns, 23.
- drill of horses, 23.
- drills, 23.
- importance of, for riot duty, 14.
- notices to men, 16.
- target practice, 23.
- triplicate lists of men for duty, 16.

PRESIDENT GRANT,

- his proclamation deciding who was governor, 141.

PRESIDENT HARRISON,

- order of, for federal aid, 139, note.

PRESIDENT HAYES,

- proclamation by, 141.

PRESIDENT OF THE UNITED STATES,

- application to for federal aid, 41, 42.
- decides between rival governors, 126.
- discretion of, in exercising martial law, 201.
- form of proclamation by, 141.
- has absolute control over federal troops, 139.
- has full authority in selecting militia, 266.
- his orders protect officer, 245.
- martial law powers of, 201.
- may use militia, 41.
- power to call out troops, 53.
- shall issue proclamation, 42.
- statutory powers in insurrection, 42.

PRISONERS,

- care of their private property, 234.
- examining, 77.
- protecting, 115.

INDEX, REFERENCES TO SECTIONS.

- where civil authorities are superseded, 121.
- PRISONERS OF WAR,
 - personal property of, 204.
- PRIVATE HOUSES,
 - when used as quarters, 232.
- PRIVATE PROPERTY,
 - aid of civil authorities, 229.
 - always protected, 204.
 - compensation for loss of, 238.
 - of enlisted men, lost, 239.
 - of officers, lost, 239.
 - of prisoners, care of, 234.
 - paid for, if destroyed by soldiers, 83.
 - taking, 229 et seq.
 - taking, under co-operative martial law, 231.
 - taking, under qualified martial law, 230.
- PRIVATE WEAPONS,
 - carried by enlisted men, 50.
- PRIVILEGED COMMUNICATIONS,
 - state executive transactions are, 240.
- PRIZE FIGHT,
 - prevention of, 36.
- PROCLAMATION,
 - advisability of, 130.
 - by commander of military district, 144.
 - closing saloons, when issued by civil officers, 151.
 - final, 148.
 - forbidding sale of fire arms, 134.
 - form of federal, 141.
 - form of governor's, 142.
 - form of, in military district, 144.
 - keeping order at night, 156.

INDEX, REFERENCES TO SECTIONS.

- not absolutely necessary, to establish martial law,
122, 130, 131.
- prepared for use, 19.
- president shall issue, 42
- recitals of fact in, 143.
- reinstating civil authorities, 135.
- sheriff's, 145.
- special, 146.
- statutory requirements, 140.
- U. S. statute provides for, 19.
- warning as to liability, 147.
- PROPERTY,
 - never unnecessarily destroyed, 204.
- PROVISIONS,
 - impressing, 237.
- PROVOST COURTS,
 - jurisdiction of, 214.
- PROVOST MARSHALS,
 - duties of, 215.
- PROVOST OFFICERS,
 - duties of, 216.
- PUBLIC MEETINGS,
 - prohibited, 153.
- PUBLIC PROPERTY,
 - care of, 47.
 - military control of, 233.
 - preventing destruction of, 161.
- PUNISHMENTS,
 - cruel and unusual, 208.
 - sentences of military commissions, 208.
- QUALIFIED MARTIAL LAW,
 - conduct of officers exercising, 78.

INDEX, REFERENCES TO SECTIONS.

defined, 194.

established without regard to statutory forms,
122.

establishing, 211.

exercise of, 210.

habeas corpus under, 221.

may become co-operative martial law, 119.

tactical use of troops under, 184.

taking private property under, 230.

QUARTERING TROOPS,
in buildings, 173.

QUARTERMASTERS,
duties of, 173, 174, 175.
U. S. manual for, 89.

QUARTERMASTER'S REPORT,
tour of duty, 277.

QUARTERS,
for mounted officer's servants, 176.

RAILWAYS,
control of, under absolute martial law, 204.

RATIONS,
enroute, 87.

REAR GUARD,
for street work, 158.

REBELLION,
defined, 32.
duty of president, 42.
federal aid in, 42.

RECEIPT OF ORDERS,
should be acknowledged, 62.

REGULATIONS,
are administrative rules, 4.

INDEX, REFERENCES TO SECTIONS.

- as to assembly of troops, 45.
- as to baggage, 88.
- as to safeguard, 162.
- as to saloons, 152.
- defined, 4.
- federal, as to status of insurgents, 197.
- federal, as to tactical use of troops, 178.
- federal, for subsistence, 169.
- force of, as military law, 10.
- state, as to tactical use of troops, should be of two kinds, 182.
- state, for subsistence, 171.
- state tactical, differ from federal, 180, 182.

REPORT OF TOUR OF DUTY,

- fairness in, 281.
- general customs, 272, et seq.
- general requirements, 273.
- medical officer's report, 275.
- staff reports, 274.
- under martial law, 280.

REPORTS,

- of tour of duty, 272, et seq.
- of progress of riot, 66.
- securing witnesses for, 161.

RESERVE,

- use of patrol wagons, by, 190.

RESISTING ATTACK,

- of mob, 111.

REVOLVERS,

- private, carried by enlisted men, 50.

RIFLES,

- firing pins may be gummed, 20.
- kept in serviceable condition, 20.

INDEX, REFERENCES TO SECTIONS.

RIGHT OF SEARCH,

under martial law, 205.

RIOT,

and mob are synonymous, 33.

appeal to governor, 57.

defined, 33.

effect on, of assembling troops, 46.

liability for destruction of property in, 73.

may be prevented, 37.

prevention of damage by, 38.

RIOT ACT,

reading, 145.

RIOT DUTY,

arresting civil authorities, 132.

assembly before receipt of orders for, 44 et seq.

benefit of instruction in, 24.

cautionary orders for, 48.

classes of calls for, 35.

construction of barricades, 163.

control of state statutes, 116.

difference in tactics between federal and state
service, 178.

form of notice to assemble for, 17.

forms of orders for, 60, 61.

general notices for, 18.

general plans depend on source of orders, 168.

governor is supreme, 127.

governor's decisions are final, 127.

importance of prompt decision, 40.

instruction in, 24.

justifiable homicide by civilians, 113.

marching on mob, 159.

INDEX, REFERENCES TO SECTIONS.

- notifying men for, 16.
 - orders for, should be in writing, 59.
 - paying troops for, 177.
 - personal conduct of officers, 79.
 - preparation for, 14.
 - preparation of equipment for, 21.
 - preventing a lynching, 160.
 - reporting progress, of troops and of riot, 66.
 - secret assembly for, 46.
 - sending troops in detachments, 86.
 - serving notices for, 16.
 - use of machine guns, 164.
 - use of scouts, 80.
 - warning men for, 46.
 - who may call troops for, 52.
- RIOTERS,
- defined, 132.
 - firing on, by advance and rear guards, 158.
 - separating, from citizens, 123.
- RIVAL GOVERNORS,
- Dorr rebellion, 126.
- SALOONS,
- closing, statutory requirements, 149.
 - custom as to closing, 150.
 - duty of military commander as to, 152.
- SAFE CONDUCTS,
- under martial law, 213.
- SAFEGUARD,
- Cossack posts for, 189.
 - defined, 162.
 - duty of sentry, 162.
 - form of, 162.
 - for threatened buildings, 162.

INDEX, REFERENCES TO SECTIONS.

- SCHOOLS,
 - for instruction in riot duty, 24.
- SCOUTS,
 - preceding troops, 80.
- SEARCH OF HOUSES,
 - under martial law, 205.
- SELF DEFENSE,
 - homicide justifiable in, 96.
- SENTRIES,
 - double, in guarding parts of city, 190.
 - firing on person crossing dead line, 162, note.
 - liability in aid of civil authorities, 260.
 - liability under martial law, 261.
 - liability under military law, 259.
 - orders of, when safeguard forced, 162.
- SEPARATE UNITS,
 - transportation of, 86.
- SERVICE,
 - of notice for riot duty, 16.
- SHERIFF,
 - may call out troops in his county, 56.
 - order by, for troops, 61.
 - powers of, 105, note.
 - proclamation by, 145.
- SITUATION,
 - legal, must be understood by officers, 246.
- SPIES,
 - need not act as such, by order, 117, note.
 - not protected by orders, 117, note.
 - procured only by contract, 117, note.
- STAFF OFFICERS,
 - duties of, 75.
 - should procure service manuals, 89.

INDEX, REFERENCES TO SECTIONS.

STAFF REPORTS,

tour of duty, 274.

STATE POWERS,

in exercise of martial law, 200.

STATE PROPERTY,

in U. S. service, 270.

STATE RIOT STATUTES,

liability of officers under, 243.

STATES,

adoption of Articles of War by, 9.

STATUS OF INSURGENTS,

federal rule as to, 197.

STATUTES,

all regulations are not, 4.

as to sheriff's proclamation, 145.

cannot strip governor of constitutional powers,
127.

federal, control tactical regulations, 179.

federal, relating to subsistence, 169.

formal, need not be followed by governor, 122.

governing calls must be constitutional, 26.

governing federal service of militia, 265.

governor may require civil authorities to enforce,
36.

preventing violation of, 212.

provide for call of troops, 25, 52.

regulate tactical use of state troops, 180.

relating to closing saloons, 149.

relative to federal aid, 42.

requiring proclamations, 140.

riot, state, liability of officer under, 243.

state, control riot duty, 116.

INDEX, REFERENCES TO SECTIONS.

- state, relating to subsistence, 170.
- unnecessary violation of, 250.
- used to determine legal questions, 72.
- STEAMER CAROLINE,
 - destruction of, 117.
- STREET COLUMN,
 - formation, use of, 23.
 - use of, 158.
- STREETS,
 - marches through, 158.
- SUBORDINATE,
 - trespass by, liability of officer, 253.
- SUBSISTENCE,
 - emergency, in federal service, 170.
 - emergency, without orders, 172.
 - federal service, 169.
 - of men before call for duty, 51.
 - of mounted officer's servants, 176.
 - procuring from civilians, 231.
 - state service, 171.
 - state service, emergency, 171.
- SUMMARY COURT OFFICER'S REPORT,
 - tour of duty, 278.
- SURGEON'S REPORT,
 - tour of duty, 275.
- SUSPENSION OF WRIT,
 - defined, habeas corpus, 219.
- SUTLERS,
 - control of, 8.
- SWORD,
 - use of, 187.
- SYSTEM,
 - for calling men for riot duty, 15.

INDEX, REFERENCES TO SECTIONS.

- of preparation for riot duty, 15.
- TACTICAL USE OF TROOPS,
 - bayonet, 187.
 - blank cartridges not used, 188.
 - differs in federal and state service, 178.
 - guarding large areas, 190.
 - in aid of civil authorities, 182, 183.
 - in federal service, 178.
 - picket posts and double sentries, 190.
 - reserves and patrol wagons, 190.
 - safeguards and outposts, 189.
 - two kinds in state service, 182.
 - under absolute martial law, 186.
 - under co-operative martial law, 185.
 - under qualified martial law, 184.
 - when controlled by state statutes, 116.
- TACTICS,
 - definition of, 181.
- TARBLE'S CASE,
 - habeas corpus, 228.
- TELEGRAMS,
 - used to make record, 56.
- TELEGRAPHS,
 - control of, under absolute martial law, 204.
- TELEPHONES,
 - control of, under absolute martial law, 204.
 - orders by, should be reduced to writing, 59, 60.
- TENTS,
 - use of, 174.
- TERRITORIAL GOVERNOR,
 - martial law powers of, 202.
- TERRITORIAL LIMITS,
 - wherein state troops are used in state service, 117.

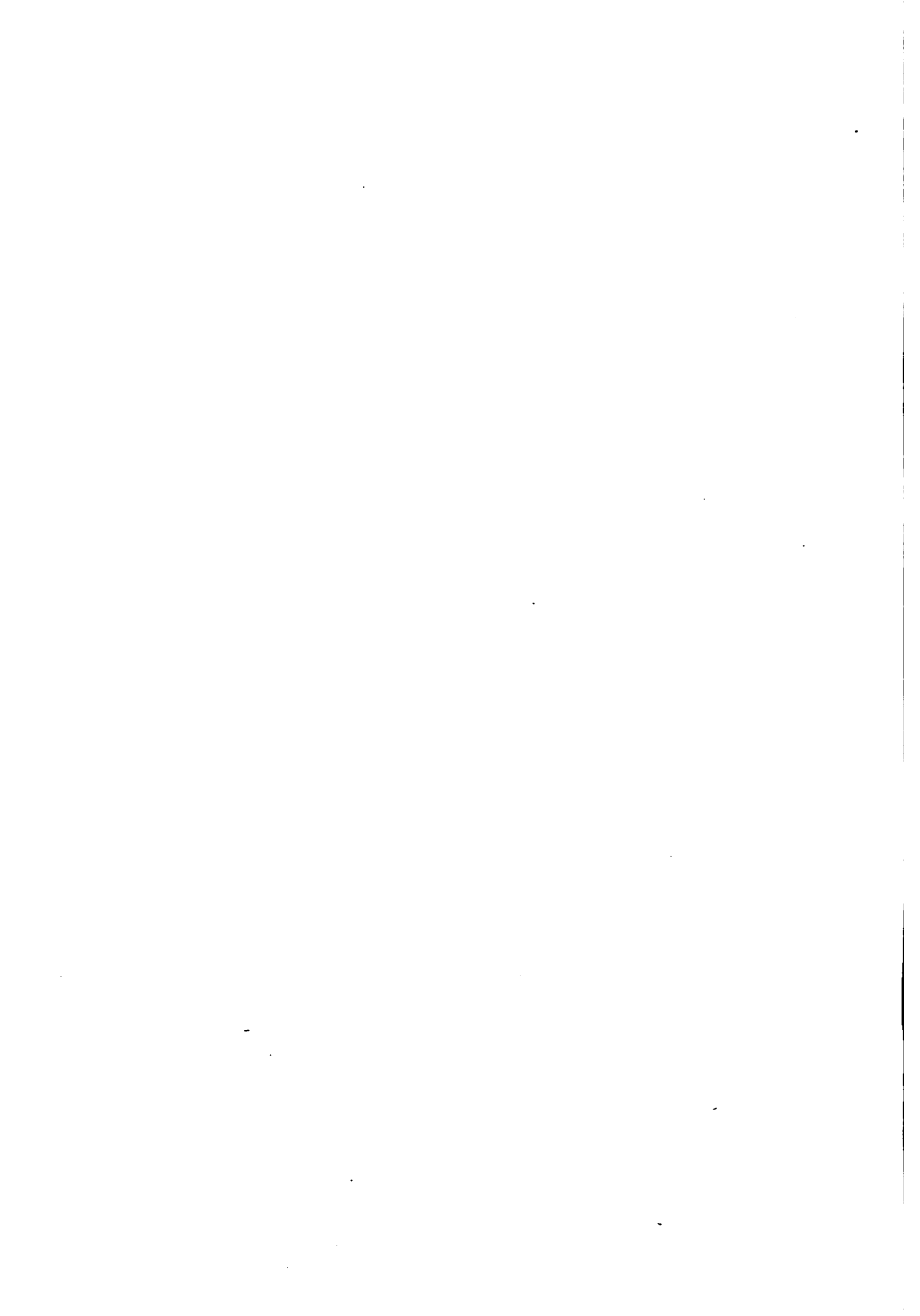
INDEX, REFERENCES TO SECTIONS.

- THEATERS,
 - regulation of, 154.
- TRAINS,
 - directed by commanding officer, 82.
- TRANSPORTATION,
 - piecemeal, 86.
 - securing, 85.
- TRAVEL RATIONS,
 - importance of, 87.
- TROOPS,
 - care of, 75.
 - when called, 25 et seq.
- TWICE IN JEOPARDY,
 - liability to be, 263.
- UNCONSTITUTIONAL LAWS,
 - call of troops to enforce, 26.
- UNITED STATES CONSTITUTION,
 - distinguishes army from militia, 1.
 - is primary source of military law, 9.
- UNITED STATES REGULATIONS,
 - applied to state troops in state service, 10.
 - supercede state, when, 11.
- UNITED STATES SERVICE,
 - company minimum of militia accepted for, 268.
 - emergency subsistence, 170.
 - horses for militia officers, 271.
 - in insurrection, statutes relative to, 42.
 - militia in, laws and regulations, 264.
 - militia officers, 269.
 - pay and pensions of militia in, 267.
 - returns for state property by militia, 270.
 - selecting militia; for, 266.

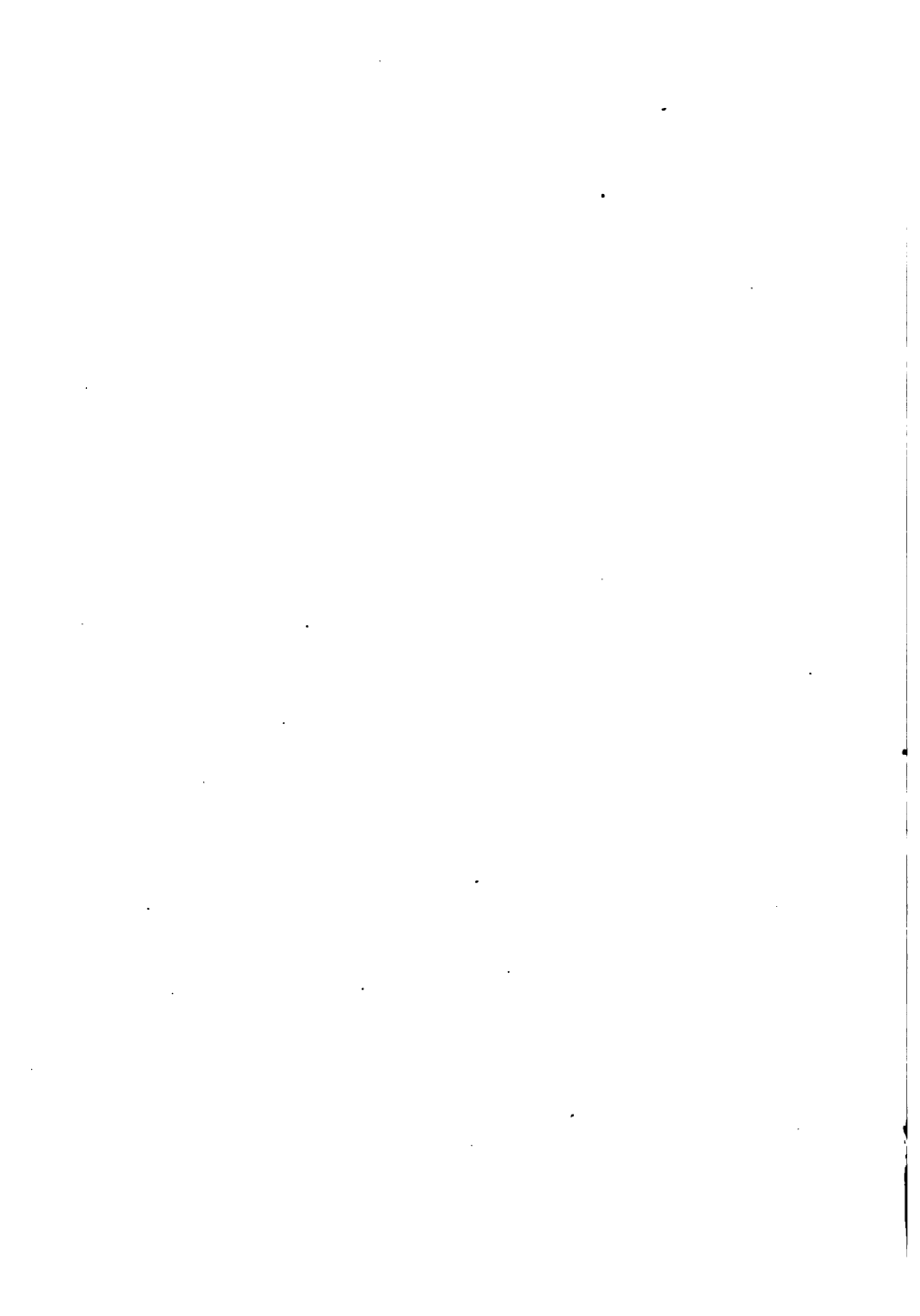
INDEX, REFERENCES TO SECTIONS.

- staff manuals for, 89.
- subsisting militia, 169.
- use of federal militia, 41.
- UNUSUAL PUNISHMENT,
 - example of, 208.
- VENUE,
 - change of, secured in federal service, 178, 228.
- VIOLATION OF STATUTE,
 - preventing, 212.
- WAR MATERIAL,
 - control of, under absolute martial law, 204.
- WEAPONS,
 - private, loaded in quarters, 50.
- WHO MAY CALL OUT TROOPS,
 - constitutions and statutes govern, 52.
- WITNESSES,
 - getting names of, 161.
- WRITTEN ORDERS,
 - should be required, 59, 60.
- WHEN TROOPS SHOULD BE CALLED,
 - civil authorities may decide, 30.
 - governor decides, 28.
 - occasions classified, 35.
 - state constitutions govern, 25.









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